

(27,295)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 540.

ROBERTO GAYON, PLAINTIFF IN ERROR,

vs.

THOMAS D. McCARTHY, UNITED STATES MARSHAL FOR
THE SOUTHERN DISTRICT OF NEW YORK, AND
SAMUEL M. HITCHCOCK, UNITED STATES COMMISSIONER
FOR THE SOUTHERN DISTRICT OF NEW
YORK.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Writ of error.....	1	1
Certificate of clerk.....	2	2
Petition for writ of <i>habeas corpus</i> and certiorari.....	3	3
Exhibit A—Commitment.....	8	6
Exhibit B—Indictment.....	9	6
Writ of <i>habeas corpus</i>	14	9
Return to writ of <i>habeas corpus</i>	15	10
Traverse to return.....	16	10
Writ of certiorari.....	18	11
Return to writ of certiorari.....	19	12
Record of proceedings before commissioner.....	20	13
Appearances	20	13
Testimony of John McLoughlin.....	21	13

INDEX.

	Original.	Print.
Testimony of Roberto Gayon.....	26	16
John K. Smith.....	50	27
Nicholas Auletta.....	52	28
Appearances	55	30
Testimony of Foster Averitt.....	56	31
Testimony of Pedro Del Villar.....	77	41
Appearances	83	44
Ruling of commissioner.....	84	45
Government's Exhibit 1 —Indictment (not set out).....	89	46
2 —Letter, Gayon to Naranjo, April 8, 1919.....	90	47
2a—Letter, Gayon to Blanquet, April 8, 1919.....	91	47
Defendant's Exhibit A—Letter, Gayon to Naranjo, April 8, 1919 (not set out).....	92	48
B—Translation of Exhibit A.....	93	48
C—Four letters in Spanish (not set out)	94	49
Translations	95	49
D—Letter in Spanish (not set out)..	98	51
Translation	98	51
F—Letter of Allen to del Villar, Feb- ruary 27, 1919.....	99	52
Opinion of Hand, J.....	100	53
Order dismissing writs of <i>habeas corpus</i> and certiorari.....	107	56
Petition for appeal and order allowing appeal.....	109	57
Assignments of error.....	112	59
Citation	114	60
Stipulation as to record.....	115	62

1 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Judges of the District Court of the United States for the Southern District of New York, Greeting:

Because, in the record and proceedings, as also in the relation of the judgment of a plea which is in the District Court before you, or some of you, between Roberto Gayon, Petitioner, against Thomas D. McCarthy, United States Marshal for the Southern District of New York, and Samuel M. Hitchcock, United States Commissioner for the Southern District of New York, a manifest error hath happened, to the great damage of the said Roberto Gayon, Petitioner, as is said and appears by his complaint, We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Judges of the United States Supreme Court, at Washington, District of Columbia, together with this writ, so that you have the same at said place, before the Judges aforesaid, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Judges of the United States Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 19th day of August, in the year of our Lord one thousand nine hundred and nineteen and of the Independence of the United States the one hundred and forty-fourth.

[Seal District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, JR.,
*Clerk of the District Court of the
United States of America for
the Southern District of New
York, in the Second Circuit.*

The foregoing writ is hereby allowed.

AUGUSTUS N. HAND,
U. S. District Judge.

2 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Alex. Gilchrist, Jr., Clerk of the District Court of the United States of America, for the Southern District of New York, by virtue

of the foregoing Writ of Error, and Petition and Order allowing Appeal and in obedience thereto, do hereby certify, that the following pages numbered from 3 to 114 inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the case of Roberto Gayon, Plaintiff in Error, against, Thomas D. McCarthy, United States Marshal for the Southern District of New York, and Samuel M. Hitchcock, United States Commissioner for the Southern District of New York, Defendants in Error, as the same remain of record and on file in said office as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 4th day of September, in the year of our Lord one thousand nine hundred and nineteen, and of the Independence of the United States the one hundred and forty-fourth.

[Seal District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, JR.,
Clerk.

[Endorsed.]

2½

[Endorsed.] Index No. M4-109.

United States Supreme Court.

Roberto Gayon, Plaintiff in Error,
against

Thomas D. McCarthy, United States Marshal for the Southern District of New York, and Samuel H. Hitchcock, Commissioner for the Southern District of New York, Defendants in Error.

Original.

Writ of Error.

William S. Bennet,

Attorneys for Plaintiff in Error,

280 Broadway,

Borough of Manhattan,

New York City.

U. S. District Court, S. D. of N. Y. Filed Aug. 23, 1919.

3 *Petition for Writs of Habeas Corpus and Certiorari.*

United States District Court, Southern District of New York.

ROBERTO GAYON, Petitioner,

against

THOMAS D. McCARTHY, United States Marshal for the Southern District of New York, and SAMUEL M. HITCHCOCK, United States Commissioner for the Southern District of New York, Respondents.

In the Matter of the Petition of Roberto Gayon for a Writ of Habeas Corpus and a Writ of Certiorari in Aid Thereof.

To the District Court for the Southern District of New York:

The petition of Roberto Gayon respectfully shows:

I. That your petitioner is a citizen of Mexico and has been a resident of the Borough of Brooklyn, City of New York, Eastern District of New York for upwards of a year last past.

II. That your petitioner is imprisoned and restrained of his liberty and detained by color of the authority of the United States in the custody of Thomas D. McCarthy, Esq., United States Marshal in and for the Southern District of New York, to wit, in the Borough of Manhattan, in said District.

III. That the sole claim or authority by virtue of which the said Thomas D. McCarthy, Marshal as aforesaid, so restrains and detains your petitioner is a certain commitment in writing, a copy of which is annexed marked Exhibit A, and that your petitioner is not detained by virtue of any judgment, decree or final order of any court.

IV. That on or about the 1st day of May, 1919, at the City of New York in said Southern District of New York, proceedings were instituted before Samuel M. Hitchcock, Commissioner of the District Court of the United States for the Southern District of New York for the removal of your petitioner to the Southern District of Texas to be tried upon an indictment alleged to have been returned by the Grand Jury in and for the Southern District of Texas, Fifth Circuit, Laredo Division, a copy whereof is hereto annexed and made a part hereof, marked Exhibit B. Said proceedings being instituted upon a complaint in writing purporting to be signed and sworn to by an Assistant District Attorney for the said District.

V. That on the 2nd day of May, 1919, your petitioner appeared before the said Samuel M. Hitchcock, Commissioner as aforesaid, and applied for an examination in pursuance of the rights and privileges accorded him by Section 1014 of the Revised Statutes of

the United States. That thereafter said examination was begun before said Samuel M. Hitchcock and said examination concluded on the 18th day of June, 1919, your petitioner being in the meanwhile released on bail pending the conclusion of such examination and decision thereon.

VI. That upon the said examination, the United States attorney offered in evidence a certified copy of the indictment found in the District Court for the Southern District of Texas, and the identity of the defendant being admitted, the government rested.

VII. That thereafter upon the said examination, the defendant Roberto Gayon, and the following witnesses, John McLoughlin, John K. Smith, Nichola Auletta and Pedro del Villar were duly sworn before the said Commissioner and they and each of them testified to the facts set forth in the official stenographer's minutes of the proceedings before said Commissioner.

5 VIII. That there was produced and admitted in evidence on behalf of the defendant, a carbon copy of the letter (in Spanish) set forth in sub-division *a* of the indictment, together with a translation thereof (in English), and various other letters written by the defendant Gayon to one Naranjo bearing dates respectively December 12th, December 23rd, 1918 and January 14th and January 21, 1919, also a letter of introduction (in Spanish) and translation thereof (in English), from the defendant addressed to General Aurelio Blanquet, given to the witness Averitt.

That the said proof and evidence, both oral and documentary, was offered to maintain the issues in this proceeding by your petitioner to be maintained, and to show that your petitioner did not commit the offence so charged in the Southern District of Texas, and that there was no probable cause to believe him guilty of any offence against the laws of the United States.

IX. That thereafter the United States attorney produced upon the stand one Foster Averitt, who was duly sworn before the said Commissioner and testified to the facts set forth in the official stenographer's minutes of the proceedings before said Commissioner.

X. That the foregoing with all the testimony and other proceedings appearing in the stenographer's minutes embrace all the proof before the said Commissioner, and as your petitioner is informed and believes, all the evidence upon which he claims to issue the commitment by virtue of which your petitioner is detained.

XI. That at the close of the said examination, counsel for your petitioner moved the said Commissioner for your petitioner's discharge upon the ground that the matters before the said Commissioner did not justify or permit a finding that there was probable cause to believe that your petitioner was guilty of any crime or offence against the laws of the United States or any crime or offence cognizable by the Court of the United States in the Southern District of Texas, and upon the ground that there were

no matters or facts before the said Commissioner which would accord to him jurisdiction to issue any writ or order for your petitioner's detention and upon the other grounds set forth in the record of the proceedings referred to, and that thereupon said Commissioner issued his order of commitment hereinbefore referred to and marked Exhibit A, and that thereupon and *the* upon the authority thereof, the said Thomas D. McCarthy took your petitioner into custody and now holds him in custody, and as your petitioner is informed and believes, the said order thus issued is the sole cause and pretense for the imprisonment of your petitioner by said Thomas D. McCarthy.

XII. That your petitioner is advised by counsel and verily believes his imprisonment, restraint and detention are without authority of law whatsoever, and that he is now deprived of his liberty in violation of his rights, privileges and immunities under the Constitution and Laws of the United States for the following reasons:

(a) That the said Commissioner was without authority, power or jurisdiction under the said Constitution and Laws by reason of any of the matters and things contained in the indictment aforesaid or by reason of anything presented or adduced upon the said examination to entertain any charge against your petitioner or to act or proceed in any manner in the premises.

(b) That the evidence given before the said Commissioner and upon which he issued the said commitment failed to show probable cause to believe that your petitioner has been guilty of any crime or offence against the laws of the United States.

7 (c) That under and by virtue of the Constitution of the United States, your petitioner is entitled to be tried and can only be indicted and tried for any alleged offence against the laws of the United States in the state or district in which the offence or offences which the indictment charges were committed. The evidence given before the Commissioner fail to show that your petitioner committed any offence against the laws of the Southern District of Texas.

Wherefore, your petitioner prays that a writ of habeas corpus issue directed to said Thomas D. McCarthy or to such other person as then may have your petitioner in custody, commanding him to bring the body of your petitioner before the court forthwith, and your petitioner further prays that a writ of certiorari in aid of the said writ of habeas corpus be issued directed to the said Samuel M. Hitchcock, United States Commissioner, as aforesaid, commanding that he return all proceedings against your petitioner to this court forthwith for such action as may be proper in the premises.

Dated, June 18th, 1919.

ROBERTO GAYON,
Petitioner.

— — —
Attorney for Petitioner.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Roberto Gayon, being duly sworn, deposes and says that he has read the foregoing petition and knows the contents thereof, and that the same is in all respects true.

ROBERTO GAYON.

Sworn to before me this 18th day of June, 1919.

SAMUEL M. HITCHCOCK,
U. S. Commissioner,
Commissioner Southern District of New York.

8

EXHIBIT A TO PETITION—COMMITMENT.

In default of bail, defendant is hereby committed to the custody of the U. S. Marshal for the Southern District of New York, to be delivered by him to the City Prison of the City of New York, and there held for order of Court.

Bail \$5,000.

Dated, New York, 6/18/19.

SAML. M. HITCHCOCK,
U. S. Commissioner, S. D. of N. Y.

9

EXHIBIT B TO PETITION—INDICTMENT.

In the Name and by the Authority of the United States of America:

In the District Court of the United States of America for the Southern District of Texas, in the Fifth Circuit, Laredo Division.

At a Stated Term of the District Court of the United States of America for the Southern District of Texas, in the Fifth Circuit, begun and held at Laredo, within and for the District, Division and Circuit aforesaid, on the third Monday in April, the same being the 21st day of April, in the year of our Lord, nineteen hundred and nineteen.

SOUTHERN DISTRICT OF TEXAS:

The Grand Jurors of the United States of America duly selected, impanelled, tried, sworn and charged to inquire into and due presentment make of offenses against the laws of the United States of America in and for the District, division and circuit aforesaid on their oaths in said Court present:

That one Roberto Gayon late of New York City in the state of New York and one Memencio Garcia Naranjo late of Bexar County, in the state of Texas, and one Santiago Mendoza, late of Webb County, in the State of Texas, District, Division and Circuit aforesaid, and divers and sundry other persons whose names and residences are to the Grand Jurors unknown, and who for that reason are not in-

dicted herein, did on or about the first day of January, 1919 wilfully, unlawfully and knowingly and fraudulently conspire, confederate and agree together and among themselves to commit an offence against the laws of the United States of America contrary to Section 37 of the Penal Code, within the territory and jurisdiction of the United States of America, to wit, to hire and retain other persons whose names are unknown to your Grand Jurors and
10 for that reason cannot be stated, to enlist and to go beyond the limits and jurisdiction of the United States of America with the intent to be enlisted and enter into the service of a foreign people as soldiers, namely: an organization in the United Mexican States in revolt against the United Mexican States organized in the interest of one Felix Diaz and commonly known and called "Felicistas" contrary to Section 10 of the Penal Code as amended by the Act of May 7, 1917. That at the time of the forming of the conspiracy and at the time of the commission and doing of the herein-after mentioned overt acts the United States of America was not engaged in a war with the United Mexican States or with the "Felicistas", and that the said Foster Averitt hereinafter mentioned was a citizen of the United States of America and not a citizen of the United Mexican States; and your Grand Jurors believe and charge the fact to be that the hereinafter mentioned Leopoldo A. Castro, Pedro Celestino Flores and Emilio F. Salinas were citizens of the United Mexican States.

And the Grand Jurors aforesaid upon their oaths aforesaid do further present: that thereafter in pursuance of and in furtherance of said conspiracy and to effect the object of the same the following overt acts were done and committed, to wit:

(a) On the 8th day of April, A. D. 1919, the said Roberto Gayon in the city of New York, State of New York, did write and deliver to one Foster Averitt a letter addressed to the said Nemencio Garcia Naranjo, and at said time did give to the said Foster Averitt certain instructions with reference to presenting said letter to the said Nemencio Garcia Naranjo, and impliedly promising to the said Foster Averitt, that upon his arrival in Mexico he would be given
11 a commission in the army of Aurelio Blanquet, and on the same date at the same place did deliver to the said Foster Averitt a letter to one D. Aurelio Blanquet who was then in Mexico and was represented to be in command of certain revolutionary forces in opposition to the established government of the United Mexican States, operating and acting in the interest of one Felix Diaz.

(b) That thereafter and on or about the 14th day of April, A. D. 1919, the said Nemecio Garcia Naranjo in Bexar County, State of Texas, did hold conversations with the said Foster Averitt, and did write a letter to the said Santiago Mendoza with reference to the said Foster Averitt, and caused the same to be transmitted and delivered to the said Santiago Mendoza at Laredo, in Webb County, State of Texas, district, division and circuit aforesaid.

(c) That at the time and places aforesaid the said Nemecio Garcia Naranjo did also deliver to the said Foster Averitt a card upon which was written the following "Graciano N. Jara" which was enclosed in an envelope bearing in substance, the following "General Tapia #109 Monterey N. Leon" with instructions as to the use of said card and said envelope in the said city of Laredo, Texas and, in the City of Monterey in the State of Nuevo Leon, Mexico.

(d) That on or about the 15th day of April, 1919 in Webb County, State of Texas, district, division and circuit aforesaid, the said Santiago Mendoza did approach the said Foster Averitt and make himself known in accordance with the instructions received by the said Foster Averitt from the said Nemecio Garcia Naranjo.

(e) That thereafter in said Webb County, State of Texas, district, division and circuit aforesaid, from on or about the 15th day of April, 1919 to the 17th day of April, A. D. 1919, the said Santiago Mendoza did hold several conversations with the said Foster Averitt with reference to his journey to Mexico in furtherance of his 12 enlistment and entering himself to go into the said United Mexican States with the intent to be enlisted and entered in the service of the army hereinbefore described as a soldier.

(f) That on the 17th day of April, A. D. 1919 and on the 18th day of April, A. D. 1919, in said Webb County, State of Texas, district, division and circuit aforesaid, the said Foster Averitt and one Leopoldo A. Castro, and one Pedro Celestino Flores and one Emilio F. Salinas did attempt to procure their passage across the Rio Grande River in order that they might hire themselves and be retained to enlist and to enter themselves and to go beyond the limits of the United States with the intent to be enlisted and entered in the service of the aforesaid army as soldiers.

(g) That on or about the 18th day of April, A. D. 1919, said Santiago Mendoza in Webb County, State of Texas, district, division and circuit aforesaid, did deliver to the said Leopoldo A. Castro or to one of the other three persons named in the next preceding section, a letter addressed to one Senor General Juan Andrew Almazan and another to Senor General Marcello Caraveo, and then and there at the same time and places did write a letter to the said D. Nemencio Garcia Naranjo, but did not sign the same, each and all of the said letters having reference to the subject matter of the aforesaid conspiracy.

And the Grand Jurors aforesaid upon their oaths aforesaid did therefore say and charge that the said Roberto Gayon and the said Nemecio Garcia Naranjo and the said Santiago Mendoza and divers and sundry other persons to the Grand Jurors unknown, at the times and places, and in the manner and form aforesaid unlawfully and fraudulently did conspire together to commit an offence against the laws of the United States of America, and that thereafter and in furtherance and pursuance of said conspiracy they did do and

13 commit the aforesaid overt acts, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

ALFRED MATTHEWS,
Foreman of the Grand Jury.

E. P. PHELPS,
*Assistant United States Attorney,
Southern District of Texas.*

Endorsed: No. 947 Cr.—United States District Court—Southern District of Texas, Laredo Division. The United States of America v. Roberto Gayon, Nemencio Garcia Naranjo, Santiago Mendoza.—Indictment—Conspiracy to enlist, etc. in Foreign Service in violation Sec. 10 P. C. 1910, as amended, vio. Sec. 37 P. C. 1910. A true bill. Alfred Matthews, Foreman. Filed this 24th day of April, A. D. 1919. L. C. Masterson, Clerk. By G. L. Sexton, Deputy.

Filed June 18, 1919.

14 *Writ of Habeas Corpus.*

The President of the United States of America to Thomas D. McCarthy, or to such other person as may have in custody Roberto Gayon, Greeting:

We command you, that you have the body of Roberto Gayon by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention by whatsoever name called or charged before a term of the District Court of the United States for the Southern District of New York to be held at the Court House thereof, Borough of Manhattan, City of New York, on the 27th day of June, 1919, at the opening of court on said day or as soon thereafter as counsel can be heard, to do and receive what shall then and there be considered right concerning said Roberto Gayon, and have you then and there this writ. Herein fail not.

Witness, Hon. Learned Hand, Judge of the United States District Court for the Southern District of New York, this 18th day of June, 1919.

ALEX GILCHRIST, JR.,

Clerk.

WILLIAM S. BENNETT,
Petitioner's Attorney,
280 Broadway, New York City.

Writ allowed June 18th, 1919.

AUGUSTUS N. HAND,
U. S. D. J.

Bail fixed at \$5.000.

AUGUSTUS N. HAND,
U. S. D. J.

Filed Aug. 26, 1919.

Endorsed: Filed U. S. District Court, S. D. of N. Y., August 26, 1919.

15

Return to Writ of Habeas Corpus.

(Endorsed on Writ.)

In obedience to the within writ of habeas corpus I produced the within named person Roberto Gayon before the court on the 18th day of June, 1919, and bail was fixed in the sum of Five Thousand Dollars and on the same day defendant was produced before Samuel M. Hitchcock, U. S. Commissioner for the Southern District of New York who released the within person on bail on the sum of Five Thousand Dollars.

THOMAS D. McCARTHY,
U. S. Marshal, S. D. N. Y.

16

Traverse of Return.

United States District Court, Southern District of New York.

M4-109.

ROBERTO GAYON, Petitioner,
against

THOMAS D. McCARTHY, United States Marshal for the Southern District of New York, and Samuel M. Hitchcock, United States Commissioner for the Southern District of New York. Respondents.

In the Matter of the Petition of ROBERTO GAYON for a Writ of Habeas Corpus.

The above named petitioner Roberto Gayon in answer to the return of Thomas D. McCarthy, United States Marshal for the Southern District of New York, to the writ of habeas corpus herein respectfully shows that the commitment returned by the said Thomas D. McCarthy, Marshal as aforesaid, as the cause of your petitioner's detention, is void and of no effect and was issued in violation of your

petitioner's rights, privileges and immunities under the constitution and laws of the United States for the reasons set forth in the petition for the issuance of the said writ to which your petitioner here now refers with the same force and effect as though the said petition were incorporated herein and set forth at length.

Wherefore, your petitioner prays for an order discharging him from the custody of the said Marshal.

Dated, July 3, 1919.

ROBERTO GAYON,
Petitioner.

WILLIAM S. BENNETT,
Attorney for Petitioner,
280 Broadway, New York City.

17 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Roberto Gayon, being duly sworn, deposes and says that he has read the foregoing traverse and knows the contents thereof, and that the same is in all respects true.

ROBERTO GAYON.

Subscribed and sworn to before me this 3d day of July, 1919.

LOUISA E. DRESSER,
Commissioner of Deeds for the City of New York,
Residing in New York County.

County Clerk's No. 128, Register's No. 20038.
Term expires October 22, 1920.

Filed Aug. 19, 1919.

18

Writ of Certiorari.

The President of the United States of America to Samuel M. Hitchcock, United States Commissioner for the Southern District of New York, Greeting:

Whereas in a certain proceeding in the District Court of the United States for the Southern District of New York, in which Roberto Gayon is petitioner, and Thomas D. McCarthy, United States Marshal for the Southern District of New York, and Samuel M. Hitchcock, United States Commissioner for the Southern District of New York, are respondents, a writ of habeas corpus has been issued, and a writ of certiorari in aid thereof has been directed.

You, therefore, are hereby commanded that searching the records and proceedings in said cause, you certify to the District Court of the United States for the Southern District of New York, held in the Post Office Building in the City of New York, County of New York, on the 27th day of June, 1919, at 10 a. m., and under your seal a

full, true and complete transcript of the record and proceedings in the above entitled cause plainly and distinctly and in as full and ample a manner as the same now remains before you, together with this writ so that the said District Court of the United States for the Southern District of New York may be able thereon to proceed and to do what shall appear to it of right to be done. Herein fail not.

Witness, the Hon. Learned Hand, Judge of the U. S. District Court for the Southern District of New York, this 18th day of June, 1919.

ALEXANDER GILCHRIST, JR.,

Clerk.

Writ allowed June 18, 1919.

AUGUSTUS N. HAND,
U. S. D. J.

Filed June 26, 1919.

Endorsed: Filed U. S. District Court, S. D. of New York, June 26, 1919.

19

Return to Writ of Certiorari.

UNITED STATES OF AMERICA
against
ROBERTO GAYON.

I, Samuel M. Hitchcock, United States Commissioner for the Southern District of New York, do hereby return the Writ of Certiorari directed to me herein dated June 18, 1919, and pursuant thereto, I file herewith a certified copy of the indictment found against the defendant and others in the United States District Court for the Southern District of Texas, and also the testimony taken before me in this proceeding, and I hereby certify that the defendant was arraigned before me on May 2, 1919, and admitted he is the person charged in the indictment and that, thereafter, testimony was taken before me, and on June 18, 1919, having concluded that the defendant should be remanded to the Southern District of Texas to answer to the indictment, I issued a commitment committing him to the custody of the United States Marshal for the Southern District of New York to await the further order of the Court in the premises.

The exhibits in the case other than the indictments are in the hands of the counsel for the respective parties, subject to the order of the court.

Respectfully submitted,

SAM'L M. HITCHCOCK,
U. S. Commissioner, Southern District of New York.

Filed June 26, 1919.

20 *Record of Proceedings before Commissioner.*

UNITED STATES OF AMERICA,
Southern District of New York:

UNITED STATES

vs.

ROBERTO GAYON.

Before Samuel M. Hitchcock, Esq., U. S. Commissioner.

New York, May 10, 1919.

Appearances:

Francis G. Caffey, Esq., United States Attorney, for the Government.

Robert P. Stephenson, Esq., Assistant U. S. Attorney, of Counsel.

William S. Bennet, Esq., Attorney for the Defendant.

Mr. Stephenson: I offer in evidence certified copy of the indictment found in the District Court of the Southern District of Texas, Fifth Circuit, Laredo Division.

(Marked Government's Exhibit No. 1.)

The Commissioner: And the identity of the defendant before me is admitted?

Mr. Bennet: Yes, sir.

Mr. Stephenson: The government rests.

21 JOHN McLOUGHLIN, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Bennet:

Q. Mr. McLoughlin, where do you live?

A. 154th Street.

Q. In Manhattan Borough?

A. Yes, West.

Q. You are employed in 320 Broadway?

A. Yes, sir.

Q. Do you know Mr. Roberto Gayon?

A. Yes, sir.

Q. Who is he?

A. This little fellow (indicating).

Q. Stand up. (Defendant stands up.) Is that the man?

A. Yes.

(The Commissioner indicated the defendant.)
Mr. Bennet: Yes.

Q. Were you employed in that building at 320 Broadway in the year 1918 and in the months of January and February, 1919?

A. Yes, sir.

Q. Mr. Gayon—did he have an office there?

A. He was in the office, yes.

Q. Who had the office?

22 A. I guess this is the man (indicating).

Q. Mr. Pedro del Villar?

A. Pedro del Villar, yes.

Q. How much of the year 1918, if you can tell us, did he have an office there with Pedro del Villar, that is Mr. Gayon? Was he in that office?

A. I could not tell you the dates.

Q. How many months?

I didn't keep any track of him.

Q. In the months of December and November, 1918, and January and February, 1918, did Pedro del Villar have an office there, and did Mr. Gayon have an office there, or was he in the office there?

A. I have seen him there during that time I imagine very often; I have taken him up and down in the elevator.

Q. You are employed there as what?

A. Elevator runner.

Q. Do you run on what tour, the late tour?

A. The late tour.

Q. In the months of November and December, 1918, and January, 1919, did you take Mr. Gayon up and down on your elevator there?

A. At night, yes, sir.

Q. Before the month of November?

23 A. Well, they were coming in and going out all the time, I didn't keep any track of him all the time.

Q. Mr. del Villar was there, he had an office there all the time?

A. Yes, sir.

Q. And Mr. Gayon was in the office?

A. Yes.

Recross-examination.

By Mr. Stephenson:

Q. This is 320 Broadway?

A. Yes, sir.

Q. What is that, an office building?

A. An office building; yes, sir.

Q. What floor was this on?

A. The seventh floor.

Q. The seventh floor. Do you know the name of the office?

A. On the door?

Q. Yes.

A. No.

Q. And you run the elevators between what hours?

A. From eleven to nine.

Q. Eleven in the morning until nine at night?

A. Yes.

Q. Are there other elevators there?

A. Yes, sir.

Q. How many?

24 A. Four more; five altogether.

Q. You run one of them between those hours?

A. Yes, sir.

Q. Now, do you know, first, that in December, 1918, and in January and February, 1919, you took Mr. Gayon up in the elevator?

A. Up and down.

Q. Up and down?

A. He was coming and going up and down all the time, any time. It is not any particular time. I didn't keep any particular time on him either.

Q. Did you know his name then?

A. No; never knew their names; they never talked.

Q. Never talked?

A. No.

Redirect examination.

By Mr. Bennet:

Q. This gentleman that stood up here, is the man that you used to take up and down your elevator in your office building?

A. Yes; I brought a slip to him around Christmas.

Q. You brought a slip to him?

A. Around Christmas time and he told me to come in when the boss was in, and I came in two or three days after, and he signed it; that is the Christmas slip, he signed it.

25 Q. That is the usual Christmas list that is made up in that office building?

A. Yes, sir.

Q. You saw Mr. Gayon himself?

A. Yes, and he told me to come back when the boss was in.

Recross-examination.

By Mr. Stephenson:

Q. You saw him in this gentleman's office (indicating)?

A. Yes.

Q. And presented him this list for the Christmas contribution?

A. Yes; and he told me to bring it back the next day or so.

Q. How long before Christmas was that?

A. About four days.

By Mr. Bennet:

- Q. You are an American citizen, I take it?
A. Yes.

26 ROBERTO GAYON, the defendant, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct examination.

By Mr. Bennet:

- Q. Mr. Gayon, where do you live?
A. 338 Fourth Street, Brooklyn.
Q. Are you married or unmarried?
A. Married.
Q. Where is your wife?
A. Here in Brooklyn.
Q. At 338 Fourth Street?
A. At 338 Fourth Street, yes.
Q. How long have you lived at 338 Fourth Street?
A. I lived there since the middle of December.
Q. 1918?
A. 1918.
Q. And before the middle of December, 1918, where did you live?
A. I lived at 501 Sixth Street, Brooklyn.
Q. With your wife?
A. Yes.
Q. How long have you lived at 501 Sixth Street?
A. I lived there about seven months.
Q. You are charged in this indictment with conspiring with two gentlemen, one named Naranjo and another named
27 Mendoza in the State of Texas. In the month of January, 1919, were you in the state of Texas at any time?
A. No, sir.
Q. In the month of January, 1919?
A. No, sir.
Q. Or December, 1918?
A. No, sir.
Q. When were you last in the State of Texas?
A. In September of 1918.
Q. At that time did you see either Mr. Narenjo or Mr. Mendoza, who are named in the indictment?
A. No, sir; I did not go nearly as far as San Antonio, where he lives.
Q. Did you ever see Mr. Narenjo in the state of Texas?
A. A long time ago.
Q. A long time? What would you say, one year or two years?
A. No, over three years.
Q. About three years ago?

A. About three years ago.

Q. Did you ever see Mr. Mendoza?

A. Once in my life.

Q. Is that the extent of your acquaintance with Mr. Mendoza?

A. That is all.

28 Q. What happened at that one interview with Mr. Mendoza?

A. Just an introduction.

Q. Just as if one would say, "This is Mr. Gayon, and this is Mr. Mendoza"?

A. I met him on the street.

Q. Did you ever have any conversation either in January, 1919, or December, 1918, or three years ago, or any time, with either Mr. Narenjo or Mr. Mendoza, in relation to hiring or enlisting men to go outside of the United States, to fight in Mexico for or against anybody?

A. No, sir; never.

Q. In the fall of 1918, did you have an office with anyone here in New York City?

A. Yes, sir, over here with Mr. del Villar.

Q. Mr. Pedro del Villar?

A. Yes, sir.

Q. Where was it located?

A. On 320 Broadway.

Q. What floor?

A. Room 706.

Q. On the seventh floor?

A. On the seventh floor.

Q. How long did you have the office there?

A. I believe it was since last summer.

29 Q. I mean until when?

A. Well, until the month of—latter part of February,—

no, of March.

Q. Until the latter part of March. Then where did you move?

A. To 41 Park Row.

Q. Have you an office at 41 Park Row now?

A. Yes, sir.

Q. What floor and what room?

A. On the 8th floor, Room 801.

Q. In regard to yourself personally, did you ever hold any office in the Mexican Government—under the Mexican Government?

A. Yes, sir.

Q. Under what president was it?

A. Under President Porfirio Diaz, under President Francisco de la Barra, under President Francisco I. Madero; and under President Huerto.

Q. And what office did you hold?

A. Mexican Consul.

Q. At what places?

A. At Roma, Texas, was the first place, and then to Costa Rica, Central America, and then came back to Mexico and then was ap-

30 pointed Mexican Consul at Mobile, Alabama, and from there I was transferred to New Orleans provisionally, and then was sent back to Mobile again.

Q. And that continued until when?

A. Until 1914, I think it was.

Q. Did you ever see this Foster Averitt?

A. Yes, sir.

Q. Where did you see him?

at 320 Broadway.
A. He came to our office about—about the 6th or the 7th of April,

Q. 1919?

A. 1919.

Q. Was he in civilian clothes, or did he wear a uniform?

A. No, sir; he was in the uniform of a naval officer.

Q. Of a naval officer?

A. Yes, sir.

Q. Are you sufficiently acquainted with the United States uniform to say whether it was the uniform of an officer or an enlisted man?

A. No, sir; I am not.

Q. Was it the uniform of a man in the ordinary navy or of the United States Marines?

A. In the United States Marines.

Q. What color was the uniform?

A. Dark blue.

Q. Dark blue?

A. Yes, sir.

31 Q. Did he make any request of you or what did he say when he came in?

A. When he came in he says to me,—I am in the office—"I am of the United States Navy," and he showed me some papers of his appointment or something, I didn't read it certainly, but different papers signed by the naval authorities here in New York, and some was by the naval authorities at Annapolis; and he said that he had to go to Mexico right away and see personally General Diaz and General Blanquet. He did not say for what purpose and I did not ask him any instructions or anything, except whether it was he asked me which was the more convenient, for him to go through Vera Cruz by steamer, or by rail. I told him I thought the quickest way would be to go by Vera Cruz. Then he says, "I am going to see what I can fix up going, because I have to go as soon as possible, and I want to have a letter of introduction for General Diaz and for General Blanquet." I said, "What kind of a letter?" He said, "Just a letter of introduction, because I must go and see them and talk to them." "Well," I said, "I will ask Mr. del Villar about this; I will see if I can give you a letter." He left the office and the next day he came back and he say, "I went to the steamship company and there is no steamer going to Mexico before next week, so I have to go by rail." I say to him, "Which way do you go?"

He says, "By the way—I am going from here to the border,
32 and then by rail to Mexico City. Where is General Diaz located?" he asked me. I said, "I do not know exactly where

he is located, you will have to find that out there." "Well," he said, "will you have those letters of introduction ready?" I said, "Yes, Mr. del Villar told me that the letters will be ready when you are ready to go, and it is a letter of introduction." "That is all I want," he says, "I must go."

Q. Were the letters and papers that he showed you apparently official papers signed by naval officers of the United States?

A. Yes, sir. Oh, yes, they had the seals.

Q. Did you read them with any care?

A. No, sir.

Q. What impression, if any, did you gain from your examination of these official papers that he showed you?

A. From his papers and from his appearance and from the uniform and the way he conducted himself and the way he talked I thought and I told Mr. del Villar that he was in the employ of the government, that he was a secret service man, I thought. I told Mr. del Villar that I thought that he belonged to the Intelligence Department, and that his object in going into Mexico was to go and make an investigation for the United States government. I didn't expect he was going to explain to me what his mission was,
33 but I thought that he was really a secret service man from the United States government.

Q. After he showed you these papers from the naval authorities, did you give him a letter of introduction to anyone in Texas?

A. On the same day—he left that day, and the next day he came back with his grip in his hand, and he said, "Have you my letters of introduction ready?" And I said, "No, but Mr. del Villar will be in, but he will not be in before noon." That was about half past ten o'clock in the morning. He said, "I cannot wait; I have to go on such and such a train"—he mentioned the hour, eleven something—"to Washington; I must go to Washington today and stay there and then I have to come back to Baltimore, and from Baltimore I have to go to Annapolis, to the Naval Academy. I will have to fix some matters there and then I will go right straight to Mexico, so I must have these letters right away."

I told him I could give him a letter of introduction to General Blanquet,—a letter of introduction to Mr. Blanquet. So I made out for him a letter of introduction to Mr. Blanquet. Then he asked me what the situation was in Mexico, in the northern states, through which he was going to travel. That was a question that he never asked before. He asked it that day. I say, "I don't know; I am not well posted about that." He say, "But I have read in the

34 papers that General Diaz has forces in different states."

I said, "Yes, but I cannot state what forces there is operating in the different states, and I cannot state where they are, or what they are doing, or what they propose to do or anything of that kind, because that is outside of my line of information entirely." He said, "Well, is there anybody in Texas that can give me this information?" I say, "Maybe Mr. Garcia Narenjo;" I says, "He is a newspaper man and he may be able to give you this information you need, because he has reports from everywhere for his paper." He says, "If you can, I wish you would give me a letter of introduc-

tion to Mr. Narenjo so I can speak to him." He acted in the way as an officer connected with the government, entirely as if he was a man in an official position from the government. I say, "Sure, I can give you a letter of introduction to Mr. Narenjo."

Q. What paper is Mr. Narenjo's paper? What is it called?

A. The paper is called the "La Revista Mexican" or Mexican Review.

Q. Where is it located?

A. In San Antonio, Texas.

Q. Did you give him a letter to Mr. Narenjo?

A. Yes, a letter to Mr. Narenjo.

Q. Did you keep a copy of it?

A. Yes, sir.

Q. In what language was the letter to him?

35 A. In Spanish.

Q. Is this paper which I show you a correct copy of the letter that you sent?

A. Yes, sir; that is the original copy, carbon copy.

Mr. Bennet: I offer it in evidence.

(Marked Defendant's Exhibit A.)

Q. It is very apparent that you speak English and can translate from Spanish into English; there is no doubt about that?

A. No.

Q. Have you made an English translation of that Spanish letter?

A. Yes, sir.

Q. Is that a correct translation of the Spanish letter that is in evidence, Defendant's Exhibit A (showing paper to witness)?

Yes, sir; this is the translation.

Mr. Bennet: And I will offer this in evidence also.

(Marked Defendant's Exhibit B.)

Mr. Bennet: I will read it to you.

(Reads Defendant's Exhibit B.)

Q. Did Mr. Averitt say anything to you or did you say anything to Mr. Averitt about his entering any armed port in Mexico?

A. No, sir.

36 Q. Did you give Mr. Averitt any money or transportation?

A. No, sir; absolutely no.

Q. Did you give him any other letter or message to Mr. Narenjo?

A. No.

Q. Other than the one that is here?

A. No, sir, absolutely.

Q. Had you had other correspondence with Mr. Marenjo in December, 1918, or thereabouts?

A. Yes, sir.

Q. In any letter that you wrote to Mr. Narenjo in December, 1918, or January, 1919, did you ever say anything to him or did

he ever say anything to you in any reply in reference to sending any person to Mexico to join the armed forces?

A. Never.

Q. I will ask you if these letters that I hand you here are copies of letters that you wrote to Mr. Narenjo during the month of December, 1918 (handing papers to witness)?

A. Yes, sir.

Q. In January, 1919?

A. Yes, sir.

Q. And if these other papers here are correct English translations of the letters (handing papers to witness)?
37 A. Yes, sir.

Q. What letters are those, what dates?

A. January 14th, January 21, December 12 and December 23.

Mr. Bennet: I offer them in evidence, the letters in Spanish and the translations in English.

The Commissioner: Give the dates of the letters.

Mr. Bennet: The letters are dated respectively December 12, 1918, December 23, 1918, January 14, 1919, January 21, 1919.

The Commissioner: Better mark them all as one exhibit.

Mr. Bennet: Yes; I offer them in evidence as one exhibit.

(Marked Defendant's Exhibit C.)

Q. Other than these letters which you have introduced in evidence, have you had any communication of any kind with Mr. Narenjo on or about January 1st, 1919, or at any date anywhere near that?

A. No, sir.

Q. Have you called him up on the telephone or has he called you up on the telephone?

A. No, sir.

Q. Has he sent you any message by wire?

A. No, sir.

38 Q. Or by word of mouth through anyone?

A. No, sir.

Q. Now in relation to General Santiago Mendoza, have you had any communication of any kind, character or description from him or sent any to him at any time?

A. No, sir.

Q. As I understand it, the one time that you met him—

A. I met him at one time about three years ago.

Q. In the public streets of San Antonio?

A. In the public street of San Antonio, that is the last time I saw him.

Q. The first and the last?

A. The first and the last.

Q. At the same time that you gave the letter of introduction to Mr. Narenjo, did you give a letter of introduction to General Aurelio Blanquet?

A. Yes, sir.

Q. And this is a copy of it (showing paper to witness)?

A. Yes.

Q. And is the paper attached to it a correct copy in English?

A. (Examining paper.) A translation, yes, sir.

Mr. Bennet: I offer this in evidence.

(Marked Defendant's Exhibit D.)

39 Q. I think you said that you had never seen Mr. Averitt before he came in with this naval uniform and with his naval papers?

A. That was the first time I saw him.

Q. And did you give him the letter of introduction?

A. I did not hear anything more from him and did not see him again.

Q. And did not see him again?

A. No, sir.

Q. He said nothing to you and you said nothing to him about enlisting in the—

A. Absolutely nothing.

Q. Was there any word in Spanish, any word in either of the letters which might be translated by anybody to mean a "military commission"?

A. I believe so; I believe that is so, that it may be misunderstood because there are—

Q. I see. What is it?

A. Because in Spanish we say—

Q. What is the word that you have in mind that you are referring to?

A. That is the words "special comision", which means "special commission", and in Spanish— —

Mr. Stephenson: Referring to Defendant's Exhibit A.

The Witness: When we employ that word it is very frequently employed, it really does not mean that it is to be a military commission or any official or political commission. It means anything a man has to do, either private or official, and when we refer to a "military commission" as we say in the States in English, we say "nombramiento" which means appointment—which translated means appointment.

Q. So if anyone familiar with the Spanish language was attempting to say that the man was to receive a military commission he would say—he would use that word "nombramiento"; is that right?

A. "Nombramiento".

Q. What English equivalents are there for the Spanish word "comision"?

A. "Comision"? Well, anything you mean to do.

Q. Some errand?

A. Errands, or something he is charged to do, or whatever he has to do, anything he may have to do, privately or officially in any capacity in any way.

Q. And has no relation whatever to a military commission?

A. Absolutely none, and we have no military relations either; we have nothing to do with military affairs. I am not a soldier myself and never have been.

Q. You are not a soldier and never have been?

A. No.

41 Q. You think that the misunderstanding in the state of Texas of this was on this?

A. I do believe so, because here they use the word "comision" as a military commission, and it means any commission, I suppose, anything to do. Maybe they thought that the word "comision" meant a "military commission", and besides I am not referring to any "commission". I am giving the man the statement that I suppose he is on, his mission, I do not know what his mission is.

Q. You use the word "comision" in the sense of errand or duty?

A. Duty.

Q. Anything of that sort?

A. Duty, I believe, is the most appropriate word there, what I wanted to mean.

Q. And entirely in a civilian sense?

A. In a civilian sense.

Q. And at the time you used that it was your impression that Mr. Averitt was an employee or an officer of the United States Government?

A. Yes, sir.

Q. Which was confirmed by the fact that he had a uniform on, and he held naval papers?

A. And I might say so now.

Q. All three things?

42 A. I am still in doubt whether he is or not a secret service man.

Q. You mean by that that it is still your impression that he is a United States Secret Service man?

A. That is still my impression.

Q. At any rate you did not make any attempt to get him into the armed forces of Mexico, and had no knowledge that he intended to join the armed forces of Mexico, if he did so intend, and when you gave him letters, which you gave him, you thought you were assisting an official of the United States in giving him that information?

A. That is the way I gave him the letter, I didn't know the man. I didn't have any interest in helping him if I didn't think that he was a secret man from the United States Government, and done this just in order to show that we were ready to help in any investigation the United States Government wished, and I was giving the letter of introduction.

Q. Have your books and records at 41 Park Row always been open to the government departments, the Department of Justice, and has that also been true at 320 Broadway?

A. Oh, yes, sir; yes, sir.

Q. Have you ever given any notice to the Department of Justice that they could come at any time and see what you had in them?

A. Yes, sir.

43 Q. To whom did you give that notice?

A. To Mr. Chalmers.

Q. Mr. Chalmers?

A. Yes.

Q. What is his first name?

A. I do not know what his first name is; he is one of the agents of the Department of Justice.

Q. At 21 Park Row?

A. Park Row Building.

Q. That is 21 Park Row.

Cross-examination.

By Mr. Stephenson:

Q. As to Mr. Chalmers, did he ever come around and look over your books?

A. He has called me over at different times on different occasions, when he was investigating certain matters.

Q. When was it that you told him that he could look over your books, do you remember?

A. When he wanted to investigate a matter a long time ago, I told him if he wanted to go to our office and see our records and files that we have there, he was perfectly at liberty to do so, perfectly welcome.

Q. I mean how long ago was it?

A. That was I believe about pretty near three years ago, perhaps something like that; I don't remember exactly the date.

44 Q. Now this man Foster Averitt, was he in a navy uniform at the time he called on you?

A. Yes, sir; all the time.

Q. Do you know whether it was the uniform of an officer or a private in the navy?

A. No; I thought he was an officer because he had a cap (indicating), something like a petty officer, I believe they call it here.

By Mr. Bennet:

Q. Petty officers would wear a cap?

A. Yes.

Q. You mean a cap with a vizor?

A. Yes, sir.

By Mr. Stephenson:

Q. Did he tell you that he wanted to go to Mexico?

A. Yes, sir.

Q. What did he tell you he wanted to go for?

A. He didn't say; he says "I have to go to Mexico right away

and see and speak to General Diaz, and to General Blanquet". That is the only thing he said.

Q. Well, did you think at that time, at the time you had this talk with him, at the time that you gave him these letters, that he was a secret service agent?

A. Yes, sir.

Q. And did you think that he was a member of the naval forces?

A. I thought he was from the intelligence—from the naval intelligence department, because, on account of his uniform.

Q. Did he say how he happened to come to you?

A. No, sir; he just came to the office, I suppose, on account of my name, Mr. Gayon, and he handed me a little card marked "Mr. Foster Averitt, United States Navy," and showed me all those papers that I didn't read over, but I saw the signatures.

Q. Did he ask you for a letter *to* introduction to Narenjo, or did you suggest that?

A. No, he asked for it. When he asked me if I could give him the information, I told him that I could not because I was not posted. He says, "Is there any man who can give me the information?" I say, "Maybe Mr. Narenjo." And then he asked for the letter.

Q. Now, this letter Exhibit A, the translation Exhibit B, is a letter to Narenjo dated April 8th. Now it says: "My dear Mr. Licenciado". That means—"Licenciado"—what?

A. "Licenciado" means a lawyer.

Q. Was Mr. Narenjo a lawyer?

A. He is a lawyer.

Q. And he is the publisher of this paper?

A. Publisher of the paper.

46 Q. Now this Spanish word in Exhibit A, "especial cerca delos". That word "cerca" means what?

A. "Near."

Q. Does not that mean "concerning"?

A. No, it means that he must go near where they are, near to the place where it was.

Q. About moving your offices—there is some other word in here "dela representacion". What does that mean?

A. Representation.

Q. Just translate that literally. The offices of what?

A. The offices of the representation to No. 41 Park Row.

Q. What did you mean there by "representation"? What representation?

A. The representation that Mr. del Villar is.

Q. What is that?

A. He is the personal representative of and the attorney of Mr. Felix Diaz.

Q. Then where you translate this: "We will move our offices tomorrow to 41 Park Row", you should have said, "The offices of the representation"? That is omitted in the translation?

A. In the translation? I say, "offices", because we work to-

gether, and I am the secretary of Mr. del Villar and I use the plural, it is just the same, either way.

Q. I mean in your translation, you do not say they were
47 the offices of the representation?

A. The offices?

Q. You simply said "offices," what is it? Of the representation?

A. Yes.

Q. So it should have added there to the word "offices" the words "of the representation"?

A. Offices of the representation.

Q. That was the representative in the United States of Felix Diaz?

A. Yes, sir.

Q. That is what it was?

A. Yes, sir.

Q. Now, were you employed by Mr. Del Villar?

A. Yes, sir.

Q. In connection with his representation of Felix Diaz?

A. I am his secretary for everything; he is a lawyer himself.

Q. You also say you are sending photographs of del Villar and Mariscal. Who is Mr. Mariscal?

A. Mr. Mariscal is also a lawyer associated with Mr. del Villar.

Q. In the same office?

A. In the same office.

48 Q. Now, what was this special errand that Mr. Foster Averitt said he had in Mexico?

A. He did not say he had any errand; he did not say what he was going for. He only say he had to go.

Q. Well, what did you have in mind in giving this letter?

A. I had a presumption that he was going to investigate how conditions were in Mexico and report his investigations to the United States Government, and that is why I said to Mr. Blanquet he will explain to you what the object of his trip was. I was not expecting him to tell me anything about his mission if he had any secret mission from the government.

Q. Now, did you tell Mr. Foster Averitt anything about presenting this letter to Mr. Narenjo?

A. The letter for Mr. Garcia Narenjo you mean, the letter to Garcia Narenjo?

Q. Mr. Garcia Narenjo.

A. Yes.

Q. What did you tell him about it?

A. That that was a letter—that he asked for it, he asked for a letter of introduction—this would introduce him to him.

Q. Did Mr. Averitt say anything about his desiring to join the forces of General Blanquet?

A. Never. He said he have to come back to the United
49 States.

Q. Did you give him any money?

A. No, sir.

Q. Did he ask for any?

A. He did not ask for any either.

Q. Now, did you tell anything to Mr. Foster Averitt as to what work you were doing here?

A. He had been reading in the papers, in the New York papers all about the publicity we were giving to the trip of General Blanquet.

Q. And what did he tell you about the reasons he was going to see General Blanquet?

A. No; he did not give me any reason, just that he had to go. He say that the impression of the general situation was very satisfactory in the United States.

Q. Now did he tell you—Mr. Foster Averitt—that he wanted to get some information from General Diaz and General Blanquet?

A. That he was to see both of them and speak to them.

Q. Do you know where General Blanquet was at this time?

A. No, sir, I do not know.

Q. Now, these other letters, Exhibit C, the first one is December 12, 1918—that is from you to whom?

A. Mr. Narenjo.

The Commissioner: We will suspend with this witness
50 until later.

JOHN K. SMITH, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Bennet:

Q. Mr. Smith, you live in the city of New York, and you are an American citizen?

A. Yes; I live in Brooklyn.

Q. That is the City of New York?

A. Yes.

Q. And you are the starter at 320 Broadway?

A. Yes, sir.

Q. And you were also in November and December, 1918, and January and February, 1919?

A. Yes, sir.

Q. How long have you been there?

A. Some years.

Q. Do you know Mr. del Villar here?

A. Yes, sir.

Q. And Mr. Gayon who was just on the stand?

A. I know the gentleman here sitting, not by name (indicating).
I do not know his name at all, but there he is (indicating).

The Commissioner: Indicating the defendant?

Mr. Bennet: Yes, sir.

51 Q. And during the months say of November and December, 1918, and January and February, 1919, did they have an office at 320 Broadway?

A. They did.

Q. Did you see them there frequently?

A. Yes, sir.

Cross-examination.

By Mr. Stephenson:

Q. You are the elevator starter?

A. Yes, sir; I have charge of all the elevators.

Q. Have you a list on a board of all the occupants?

A. A bulletin board in the hall.

Q. Is Mr. Gayon's name on that list?

A. I do not think so.

Mr. Bennet: Is Mr. del Villar's name there?

The Witness: Mr. Del Villar is there on that list.

Q. How often would Mr. Gayon come there?

A. Why, he used to come in in the morning around half past ten. I didn't take note of the time, so many people, you know, passing in and out, and go out in the afternoon in lunch and back again and out at night. I do not know what time he left.

Q. Was that continuing right along or was there a time when he was not there, or what did you notice?

A. I could not notice that.

Q. You could not notice that?

52 A. No. Of course, I noticed him off and on, right about in December.

Q. Particular in December?

A. Yes, because during the Christmas time my man told me he had been to that room, and found a gentleman sitting up there and he was told to come back and he did go back and they signed the list, and when they paid the list, Mr. del Villar made out the money in a check, and he handed it in down in the hall, he gave me a check there.

By Mr. Bennett:

Q. They were going in and out just about the same as others?

A. Why, as any ordinary tenant of the building would, yes, sir.

NICHOLAS AULETTA, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Bennet:

Q. Mr. Auletta, you are a barber?

A. Yes, sir.

Q. And is your shop at 327 Fifth Avenue, Brooklyn?

A. Yes, sir.

Q. Do you know Mr. Gayon that was on the stand?

A. Yes, sir; I know that gentleman.

53 Q. Does he come into your shop to have his hair cut and be shaved and such things as that?

A. Yes, sir; been coming in there for about a year.

Q. During the months of November and December, 1918, and January and February, 1919, how frequently did you see him over there in Brooklyn?

A. He passes by the shop twice daily.

Q. Twice daily?

A. Yes, sir.

Q. How far is the place where he lives from your shop?

A. Well, at the present he is on Fourth Street, right around the corner.

Q. And your shop is in Fifth street?

A. No, Fifth Avenue.

Q. How frequently would you say that you saw him and speak to him, practically every day?

A. Every day or twice a day.

Q. When he goes by in the morning and when he comes back at night?

A. When he passes in the morning and every evening.

Cross-examination.

By Mr. Stephenson:

Q. It was during what months then that you saw him?

A. What months? He has been passing by there for the last year, about a year.

Q. A year from now, back a year?

A. Yes, sir.

54 Q. This is April. Now, since last April he has been?

A. Certainly.

Q. Passing back and forth twice a day?

A. Yes, sir.

Q. Do you own the shop?

A. My father owns the shop.

Q. How many other barbers are there?

A. Two at the present time.

Q. How frequently does he come to your shop?

A. Well, he only gets a haircut, see, and he comes there about every second week.

Q. Do you know his name?

A. I didn't know his name until I got this letter.

Q. Just remember his face?

A. I know his face quite well.

Q. How did you happen to notice that he went back and forth twice a day?

A. He has been coming into the shop for quite a long while.

Redirect examination.

By Mr. Bennet:

Q. He is a regular customer?

A. Yes, sir.

Q. You are here under subpœna?

A. Yes, sir.

(Adjourned to Thursday, May 15th, 1919, at 10:00 o'clock a. m.)

55 UNITED STATES OF AMERICA,
Southern District of New York:

Before Samuel M. Hiteheock, Esq., U. S. Commissioner.

UNITED STATES

vs.

ROBERTO GAYON.

New York, May 15th, 1919.

Hearing resumed pursuant to adjournment.

Appearances:

Francis G. Caffey, Esq., United States Attorney, for the Government;

Robert P. Stephenson, Esq., Assistant U. S. Attorney, of Counsel.

William S. Bennet, Esq., Attorney for the Defendant.

(Whereupon the further hearing was adjourned to Monday, June 9, 1919, at 10:30 A. M.)

56 UNITED STATES OF AMERICA,
Southern District of New York:

Before Samuel M. Hitcheock, Esq., U. S. Commissioner.

UNITED STATES

vs.

ROBERTO GAYON.

New York, June 9, 1919.

Hearing resumed pursuant to adjournment.

Appearances:

Francis G. Caffey, Esq., United States Attorney, for the Government;
Peter B. Olney, Jr., Esq., Assistant U. S. Attorney, of Counsel.
William S. Bennet, Esq., Attorney for the Defendant.

FOSTER AVERITT, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Olney:

Q. Where is your home, Mr. Averitt?

A. Seminole, Texas.

57 Q. Did you ever see Mr. Roberto Gayon before Saturday, when you saw him here, the gentleman over here (indicating)?

A. Yes, sir.

Q. Did you ever see the gentleman next to him?

sir. A. I couldn't say as to seeing him, but I believe I met him,

Q. You are sure you saw Mr. Gayon?

A. Yes, sir, I am sure I saw Mr. Gayon.

Q. Where did you see him first?

A. In 320 Broadway, Room 706 I believe it was.

Q. When was that, please?

A. That was on the 5th of April, Saturday.

Q. Saturday the 5th of April?

A. About between ten and eleven o'clock, I believe.

Q. What was the occasion of your seeing him on that day, Mr. Averitt?

A. I was in New York; I had been looking around for engineering work and the most encouragement I had received had been from friends in South and Central American countries, for instance the Braden Copper Company, and I went there and I was looking over

the directory below and I saw the name of Mr. Villar, and I thought I might get some information and I went in;—you see, the office there has two rooms—there was a front and back part to it, and Mr. Gayon was in there. He was talking with a man, and I waited for a while, and while I was waiting, naturally I looked around and there was a picture of Felix Diaz and several proclamations, propaganda stuff, you understand, and of course I knew of the political condition in Mexico, and I naturally jumped to the conclusion—

58 Q. Well, I don't think we will take your conclusion.

The Commissioner: No.

Q. You saw Mr. Gayon later; did you have a conversation with him?

A. Yes. As soon as the gentleman left.

Q. Well, what did you say to Mr. Rayon, and what did Mr. Gayon say to you, in words or in substance?

A. I started to talk with him about Mexico. He said, Why don't you go to the Mexican Embassy? I said something about there being representatives of the Carranzista Government. Then he smiled and invited me to sit down, and I said, I suppose you need some men who understand military matters—I was in uniform at the time.

Q. In what uniform were you in at the time?

A. The uniform of midshipman of the United States Navy.

Q. You had been a midshipman in the United States Navy?

A. Yes, sir.

Q. What did he say to that?

A. He said that on account of the neutrality laws, that they couldn't accept any, but that they might have need of some, but that on account of the—and then I asked him if there would 59 be any opportunity for me there.

Q. What did he say to that?

A. He said that on account of the neutrality laws he would be unable to give me any kind of commission, or accept my services in Mexico, but I pressed the matter and he offered, he said to come back Monday—you see this was Saturday—and we would talk the matter further. I went back Monday and saw him again, and Monday I met another Mexican, whom I believe to be the man there, I am not certain as to that.

Q. What did Mr. Gayon say and what did you say on Monday when you came back?

A. He said that he had talked the matter over with Senor Del Villar, and they thought, the fact that I had been in the United States Navy would be the best possible recommendation.

Q. And then what happened?

A. And that he couldn't give me a commission on account of fear of violation of the neutrality laws, but he could give me a letter of introduction to General Diaz and Blanquet, or rather to General Blanquet.

We discussed the matter of getting down there, and he also said it would be a violation of the neutrality laws to advance me money for the purpose—well, I knew that—and none was advanced.

60 I was to go down on the Ward Line, you see, to Vera

Cruz, but on account of difficulties in getting a passport—you can't get them in a hurry—and there were several declarations in there that I didn't care to make—I asked him if it were possible to cross the Rio Grande River. He said he thought it would be if I cared to go down overland, and for that I should see Senor Nemenecio Garcia Naranjo—he is the editor of the Revista Mexicana, Mexican Review at San Antonio.

He said he would give me a letter of introduction to him, so I went back—

Q. Next day?

A. I believe it was the next day.

Q. Have you a memorandum there?

A. Yes, sir, it was the 8th. I went back the morning of the 8th and he wrote me two letters, one to General Blanquet and one to Garcia Naranjo.

Q. Are those the two letters (handing papers)?

A. That is the one to Blanquet and that is the one to Naranjo—it didn't have the pencil memorandum at the bottom, though.

Mr. Olney: Those are the originals of the copies of letters that have been offered in evidence, Mr. Commissioner—I don't know whether you want the originals offered.

61 Mr. Bennet: I understand you are not offering the pencil memorandum at the bottom.

Mr. Olney: No. I will offer these two originals in evidence—not the pencil memorandum at the bottom.

(Marked Government's Exhibits Nos. 2 and 2-A.)

Q. Was there any further conversation with Mr. Gayon on that day?

A. Well, on the day before, we discussed the condition of affairs in Mexico in general, and we also discussed the location of several of the forces down there, particularly General Diaz, Paso del Marcho, General Almazon, across the border.

Q. Was there anything said by Mr. Gayon and by you at that time, as to the possibility of your getting a commission in the Army of General Blanquet or Felix Diaz?

A. Well, I asked him that, yes, sir.

Q. What did you say to him, please?

A. I asked him for assurance that when I went down there, it would not be for nothing. He wouldn't give me a commission here, and he said there would be no difficulty in my getting a commission from General Blanquet, and he said to tell General Blanquet to put me on his personal staff.

Q. Did he say anything at all about what rank you might expect to get down there, if you went in?

A. Well, just before we left, the last thing he said, he
62 said that he expected that I should be at least a Colonel when
he saw me again down there.

Q. When you left New York, just describe very briefly what
happened to you. After you left New York you took the train and
went to Mexico, did you?

A. Yes, sir.

Mr. Bennet: Went to Texas, you mean.

The Witness: To Texas, to Garcia Naranjo.

Q. And did you deliver him the letter?

A. Yes, sir. I got there on the night of the 12th; the next day
was Sunday and naturally he wasn't at the office of the Revista,
so I went to his residence about two o'clock on Sunday afternoon,
and gave him the letter, and he said to come back.

Mr. Bennet: I object to the conversation between this witness and
Naranjo, not in the presence of the accused.

Mr. Olney: All right.

Q. Don't state any conversation. Naranjo gave you a letter?

Mr. Olney: You don't want the conversation but you don't mind
giving him the letter.

Mr. Bennet: I don't mind that he delivered the letter to Nar-
anjo.

Q. You delivered the letter to Naranjo?

A. Yes, sir.

63 Q. Then you went from Naranjo to where? You went
from Naranjo to somebody else?

A. Well, look here, I don't know how you are going to get around
that other letter.

Mr. Olney: Here is what I am trying to bring out; the fact of
his getting down there, and having been instructed by these people
to go to a certain place, and his attempt to cross the river, and his
capture by the Customs guard. That immediately follows the con-
nection between the letter he got to deliver to Naranjo and the at-
tempted violation of the neutrality laws.

The Commissioner: He may state what actually occurred, elimi-
nating anything in the way of conversation.

Q. You went to Naranjo, you got a letter from Naranjo?

A. I got a letter from Naranjo.

Mr. Bennet: Just note my exception, please.

Q. Addressed to whom?

A. General Santiago Mendoza, at Laredo, Texas.

Q. You went to Laredo?

A. I went to Laredo.

Q. What did you do?

A. Attempted to cross the river.

Q. Did you see Mendoza?

64

A. Yes, sir.

Q. Then what happened?

A. He made arrangements for crossing the river.

Q. Don't say that.

Mr. Bennet: I move to strike that out.

The Commissioner: Strike it out.

Q. Just what you did after you saw Mendoza?

A. A man by the name of Castro, another Mexican whose name I don't know, tried to cross the river—well, we tried to cross on the 17th and were caught.

Q. And who caught you?

A. Customs Guards.

Mr. Olney: That is all.

Cross-examination.

By Mr. Bennet:

Q. When you came to the office at 320 Broadway, you had recently resigned from the Naval Academy at Annapolis?

A. Yes, sir.

Q. And the uniform to which you alluded was the uniform which you had worn as a student at Annapolis?

A. Yes, sir.

Q. You had been appointed there by the nomination of Congressman W. R. Smith, on the 1st of March, 1917, and you had resigned on the 24th of March, 1919; your resignation had been accepted on the 27th of March, 1919?

A. You are right, sir.

65 Q. What papers did you show Mr. Gayon here?

A. I showed him my warrant as a midshipman in the United States Navy and also the acceptance of the resignation—I believe those were all.

Q. Both on official United States paper, of course?

A. Yes, sir.

Q. In your conversations with him, what language did you use?

A. English.

Q. Do you speak Spanish?

A. I speak it a little, sir; I can get along in it but it is too broken to make very much use of it.

Q. And as I understand you, when you saw Mr. Del Villar's name on there, you had no idea of entering the military service of anyone in Mexico, but were looking for an engineering position?

A. Yes, but when I saw this other—

Q. Just one thing at a time. In the room to which you went there were what I think the Mexicans call manifestos?

A. Manifestos, yes.

Q. Framed and hanging on the walls?

A. Yes, on the walls, and they were in the form of pamphlets—there is one of them there, I noticed it when I came in.

Q. This paper I show you is a paper similar to the ones
66 you saw lying there?

A. I believe it is; it had Diaz's picture on it; I believe it is
the same one—Mr. Gayon gave me a copy.

Q. That is printed in English?

A. Yes, sir.

Mr. Bennet: I will ask to have that marked for identification.

(Marked Defendant's Exhibit E for identification.)

Q. Your recollection is that you were there three times, is that
correct, three different days?

A. I was there three days, sir,—I believe on Monday I was there
twice, sir.

Q. On which day was it that you showed Mr. Gayon your warrant
and your resignation?

A. I believe it was—it is either the first or the second time I was
there, I couldn't say as to that; I believe it was the first.

Q. What was the purpose or what were the surrounding circum-
stances of showing him those two papers?

A. Well, I had them with me.

Q. Well, other than having them with you?

A. Well, you see, I was after a commission, after I saw the
proclamations and so on, I saw a chance, what looked like to me a
pretty good advancement, and there wasn't anything else doing just
then.

67 Q. Then it was at that time Mr. Gayon told you that owing
to the neutrality laws, he was not permitted to offer you any
commission, is that correct?

A. Yes, sir.

Q. When you went down to Texas, you paid your own fare?

A. I paid my own expenses, yes, sir—well, I beg your pardon, sir.
I received—that is, after I was at Laredo I received fifteen dollars
from General Mendoza.

Q. But as far as Mr. Gayon was concerned, you paid your own
expenses?

A. Yes, sir. Also, there is another thing that perhaps ought to be
mentioned there, those men down there didn't know—

Q. I will ask you that in a moment, it may come in later.

A. All right.

Q. Was it a part of your course at the Academy to study the neu-
trality laws?

A. No, sir, all I had was just a general idea.

Q. And as far as your general idea of the neutrality laws was
concerned, was Mr. Gayon stating to you correctly the American
neutrality laws?

A. I knew there was a violation of neutrality to organize an expe-
dition from this side, sir.

68 Q. And Mr. Gayon reminded you of that in connection
with your request for a commission?

A. Yes, sir—well, I knew that.

Q. And he also called your attention to the fact that that would

be a violation of the neutrality laws if you did anything of that kind here in America?

A. Yes, sir, he said it would not be a violation of the neutrality laws to give me a letter of introduction to General Blanquet.

Q. And pursuant to that, he did give you a letter of introduction?

A. To General Blanquet.

Q. Which is in evidence?

A. Yes, sir.

Q. And also a letter of introduction to General Diaz?

A. No, sir.

Q. To Narango?

A. Yes, sir.

Q. General Diaz was mentioned in the letter to General Blanquet?

A. Yes, sir.

Q. The two were to confer together?

A. Yes, sir.

Q. After you left New York, did you communicate in any way with Mr. Gayon or did he communicate in any way with you?

69 A. No, sir.

Q. You heard nothing from him at all?

A. No, sir.

Q. You say you saw Mr. Del Villar once or twice?

A. Yes, sir, I believe I saw him when I was there on Monday.

Q. Was he present at any of the conversations you had with Mr. Gayon?

A. No, sir—that is, none of those where we discussed this matter of going down there.

Q. What happened at the time Mr. Del Villar was in the room?

A. They were talking.

Q. You weren't taking any part in the conversation?

A. No, sir.

Q. Were they talking in English or Spanish?

A. Spanish.

Q. And you are quite sure that you didn't discuss with Mr. Gayon or with Mr. Del Villar, anything about going to Texas while Mr. Del Villar was in the room?

A. I don't believe I did, sir—that may have been possible, but then I don't think I did, sir. We discussed going down by way of the Ward steamer on Monday afternoon when I came back up; it was just rather hurriedly.

Q. But Del Villar was there at that time?

70 A. Yes, sir.

Q. And the question was discussed then, whether, on the trip to Mexico, you should go by the Ward Line steamer to Vera Cruz, or otherwise, is that correct?

A. I don't remember that he was there then, sir.

Q. Did this Mr. Del Villar say anything to you as to what his relation was to the Villasista movement or to General Blanquet, or anything of that sort?

A. No, sir.

Q. Didn't you say to Mr. Del Villar, or rather didn't this conversation occur between you and Mr. Del Villar on the Monday you went back there?

Mr. Olney: I don't see what materiality the conversation with Mr. Del Villar has?

Mr. Bennet: In the presence of Mr. Gayon.

The Commissioner: I won't limit it in that way, you may proceed.

Mr. Bennet: I changed it, Mr. Commissioner, to say in the presence of Mr. Gayon—that would make it material.

Q. Didn't this occur between you and Mr. Del Villar, that you said something to Mr. Del Villar about wanting to see General Blanquet and Diaz, and Mr. Del Villar said, When you have received your passport to come back and see him?

71 A. I told you, when I got the blank for an application for a passport, I went back there Monday afternoon. We were looking it over, and in there you got to have the name of someone, you see, that you are going to in Mexico, and Mr. Del Villar gave me two names to refer to, but we didn't say anything about the trip to Texas that I remember when Mr. Del Villar was there.

Q. That is, you said nothing about the trip which you subsequently actually took?

A. It says overland—

Q. Texas is your home?

A. Yes, sir.

Q. You were appointed from there and you went back after you resigned?

A. Yes, sir.

Q. One of your reasons for resigning from the Naval Academy was that the pay of the naval officer was not sufficient to support you and help you to educate your younger brother and sister, is that right?

A. Yes, sir.

Mr. Bennet: That is all.

Redirect examination.

By Mr. Olney:

Q. Mr. Averitt, as I remember, you stated something to me about your having some conversation with Mr. Gayon about the refund of your expenses down to Texas. If I am in error, and you 72 didn't say so, then correct me please.

A. He said it might be possible to get them refunded when in Mexico, sir.

Mr. Olney: That is all.

The Witness: Have it made up, rather—I don't believe he used the word "refund", sir.

Q. What did he use?

A. I believe he said have it made up, that I would make it up there.

Q. In Mexico?

A. Yes, sir. But the word "refund" was not used.

Mr. Olney: That is all.

Recross-examination.

By Mr. Bennet:

Q. In other words, he said that if you got over to Mexico and did get with General Blanquet, that it might be possible that in some way this expenditure might be made up to you?

A. Yes, sir; but it wouldn't be in the nature of a refund of traveling expenses. That would still be, of course, a violation of the neutrality law.

Q. And in all this conversation he impressed upon you that he would do nothing in this country to violate the neutrality laws of the United States?

A. He was especially anxious to avoid that, because he said that their only chance lay in keeping friendly relations with the
73 United States.

Q. Did he tell you that he had had friendly relations with the State Department and other departments of the United States Government?

A. Well, he said that the relations had been friendly—he was speaking then of a matter that is referred to in one of those letters. You know, General Blanquet left here and went to Ambassador Bonillas, and went to the State Department to find out how his passports were given—that is what we were talking about then.

Q. And I presume he told you that General Blanquet went out of the country under his own name and openly?

A. I don't believe that he said that, sir.

Q. Have you told about everything that you recall of the conversations between you and Mr. Gayon?

A. I told where we discussed—

Q. I should be very glad, if there is anything that either of us haven't asked you about, in the conversations between yourself and Mr. Gayon, to have you put it in the record.

A. I told you we discussed the military situation in Mexico.

Q. Yes. Did you at any time at any of your visits say that you had come up to their office looking for an engineering position?

A. Well I went up there, I thought they might have some
74 information on what was doing down in Mexico in that line.

Q. And your education at the Naval Academy—

A. It was technical, you study engineering there, mechanical engineering especially.

Q. Did you tell Mr. Gayon or Mr. del Villar that you had had an engineering experience at the Academy?

A. Yes, sir. I also told them that I knew, after we got through

discussing this matter of commission, we discussed machine guns, you see, things like that.

Q. Of course, your course had included that—you had been there two years?

A. Yes, sir.

Q. But at all times Mr. Gayon was very careful to tell you he would not do anything to violate the neutrality laws of the United States?

A. Yes, sir. And there was another thing that came up in the conversation, sir, that I started to mention.

Q. Go right ahead.

A. He said—well, this doesn't have anything to do with it, I don't suppose, it would have more to do with this other case down on the border.

Mr. Olney: Well, Congressman Bennet has called for any other conversation that you have not stated, so you can go ahead and state it—I guess he won't object to that.

75 Mr. Bennet: No, no; anything that he said to Gayon or Gayon said to him.

The Witness: He said, when I went to see Naranjo not to tell him why I was going to Mexico.

By Mr. Olney:

Q. Not to tell him why you were going?

A. Yes, sir.

Q. Did he say why? Did he tell you why he didn't want you to tell him?

A. He said because there were so many spies and so on around San Antonio—in San Antonio there are a great many Mexicans, from there on down to the border, and a lot of them belong to one faction or the other.

By Mr. Bennet:

Q. Your instructions, then, from Mr. Gayon, were not to say anything to Mr. Naranjo except to hand him a letter of introduction?

A. To give him a letter of introduction and tell him where I wanted to go.

Q. And to be very careful not to tell him that you wanted to have anything to do with the Mexican army?

A. Yes, sir.

Q. Or with the Blanquet army?

A. That is what I mean.

76 Mr. Bennet: That is all.

Mr. Olney: That is all. I think I have shown sufficient grounds for the removal of Mr. Gayon, Mr. Commissioner.

The Commissioner: Well, Mr. Bennet would like to put in some further evidence and I am not inclined to refuse him.

Mr. Bennet: I might cover it by a concession. What I want to prove is that during the latter part of 1918, in the early months of

1919, also, Gayon was continuously here in the state of New York and not in Texas.

Mr. Olney: You put in a whole lot of evidence of that already. I do not know whether it is so or not, but you put in two or three witnesses, and you put on the defendant himself, so it isn't very material anyway.

Mr. Bennet: Well, I think it is.

Mr. Olney: All right, it is only cumulative.

Mr. Bennet: Do I understand that you do not want to complete the cross-examination of Mr. Gayon?

Mr. Olney: I do not care to examine him any more.

77 PEDRO DEL VILLAR, a witness called in behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Bennet:

Q. Mr. Del Villar, where do you live?

A. 606 West 137th Street?

Q. Did you live, during the year 1918 and the year 1919, up to the first of May, up there?

A. I have been living, in such days, at 601 in the same street.

Q. Do you know Mr. Roberto Gayon?

A. Yes, sir, he is my secretary.

Q. He was your secretary?

A. Yes, sir.

Q. And to your knowledge where was he from about the first of August, 1918, until the present time?

A. He has been remaining here in New York working with me.

Q. Has he been out of the state long enough to have gone to Texas and back during that time?

A. Well, no, because he has been there to my office.

Q. You heard the witness Averitt mention that there were proclamations and papers of that character lying around your office?

A. Yes, sir, they are.

Q. Are those proclamations of a secret character or public?

78 A. Absolutely not, they are delivered to all officials of the United States.

Q. I show you this letter and ask you if it is a letter received by you?

A. This is one of the different letters that I have received about the situation of the pamphlet.

Mr. Bennet: I offer it in evidence.

Mr. Olney: No objection.

(Marked Defendant's Exhibit F.)

Mr. Bennet: That is all.

Cross-examination.

By Mr. Olney:

Q. What is your business?

A. Political exile.

Q. Well, you have a secretary and your office here in New York?

A. Yes, sir, because I am the representative of General Felix Diaz.

Q. From whom do you receive your salary, if any, while in New York?

A. I receive from my properties in Mexico, from Mexico City I receive my salary.

Mr. Bennet: But that isn't a salary.

Q. What is your business up here? What do you do with a secretary and an office?

A. Because I have been working for the government of
79 Mexico, the Liberty loan.

Q. You have not been doing anything but Liberty Loan, have you?

A. Oh, yes, sir.

Q. Is that all you have been doing?

A. Oh, I have been doing a lot of work for General Diaz.

Q. All these things?

A. All these things for General Diaz.

Q. Is your business disseminating these pamphlets and things?

A. To make, to know in the United States what is the aims of General Diaz and the national government.

Q. That is your whole business?

A. That is my whole business.

Q. And that is the whole business Gayon was employed in?

A. In connection with me, yes.

Q. And you are intensely devoted to the cause of General Felix Diaz?

A. Yes, sir.

Q. And intensely opposed to the cause of Carranza?

A. Yes, sir, absolutely.

Q. And anything you could do, within the bounds of proper respect for the laws of the United States, you would do to advance the cause of Felix Diaz?

A. Yes, sir.

80 Q. That is correct?

A. Yes, sir.

Q. How long did you say you had been up here?

A. Well, during five years.

Q. You have been here for five years?

A. Yes, sir.

Q. How long has Gayon been with you?

A. Only in the last time, the last two years, about the last two years.

Q. Were you in New York City every day during the year 1918?

A. Yes, sir.

Q. Did you take no vacation at all?

A. No vacation at all.

Q. And Gayon didn't have any either?

A. During all such times he has been with me.

Q. Where do you live, did you say?

A. 606 West 137th Street.

Q. And where does Gayon live?

A. He lives in Fourth Street, Brooklyn, but he comes over to my office, that I have in the last part of 1918, and in 320 Broadway, and now in 41 Park Row.

Q. You are his boss?

A. Well, not properly boss, because I don't pay him nothing. We are working for our country.

81 Q. Does he take his orders from you?

A. Yes, sir.

Q. And to that extent you are his boss?

A. Well, in that extent, yes, sir.

Mr. Olney: That is all.

Redirect examination.

By Mr. Bennet:

Q. As to salary, does General Diaz pay you a salary or do you live on your income?

A. No, sir, I live from my income.

Q. Mr. Olney asked you if you got a salary from General Diaz?

A. No, I get no salary.

By Mr. Olney:

Q. Where do you get your money from?

A. From Mexico City. I receive from the house of Maitland & Company, every month I receive my money and that is sent to me from Mexico City.

Q. Who sends that money?

A. My attorney there.

Q. You have investments in Mexico?

A. Yes, sir.

Q. Where does Gayon get the money with which he maintains himself and family in New York City?

A. As far as I know, General Blanquet, who was giving him some amount of money for to be also his secretary.

82 Q. Mr. Gayon was also secretary to Blanquet as well as your secretary?

A. Has been secretary of General Blanquet.

Mr. Olney: That is all.

Mr. Bennet: That is all.

The Commissioner: Now, all you desire, Mr. Bennet, is to show

that the defendant was not in Texas during a certain period and that you have covered by his own testimony and by this gentleman.

Mr. Bennet: Yes, sir. Could I have a little time to put in a memorandum?

The Commissioner: Yes. I will hold the matter over until Saturday and you can present a memorandum in the meantime.

Mr. Olney: Might we have the scope of the memorandum limited, if possible, to find out from you, Mr. Commissioner, as to what you wish? If there is any particular point that Mr. Bennet has in mind I would like to meet it, but I don't care to go into this matter on the merits.

The Commissioner: My judgment is that I have got to hold the defendant for removal, but I will give him a chance to turn the matter around the other way, if he can. We will adjourn the hearing over until the 17th, at ten o'clock.

(Whereupon, adjournment was taken to June 17th, 1919, at 10:00 a. m.)

83 UNITED STATES OF AMERICA:
Southern District of New York:

Before Samuel M. Hitcheock, Esq., U. S. Commissioner.

UNITED STATES

vs.

ROBERTO GAYON.

New York, June 17, 1919.

Hearing resumed pursuant to adjournment.

Appearances:

Francis G. Caffey, Esq., United States Attorney, for the Government;

Peter B. Olney, Jr., Esq., Assistant U. S. Attorney, of Counsel.

William S. Bennet, Esq., Attorney for Defendant.

Whereupon the further hearing was adjourned to Wednesday, June 18, 1919, at 10:30 A. M.)

84 UNITED STATES OF AMERICA:
 Southern District of New York:

Before Samuel M. Hitchcock, Esq., U. S. Commissioner.

UNITED STATES

VS.

ROBERTO GAYON,

New York, June 17, 1919.

Hearing resumed pursuant to adjournment.

Appearances:

Francis G. Caffey, Esq., United States Attorney, for the Government;

Peter B. Olney, Jr., Esq., Assistant U. S. Attorney, of Counsel.

William S. Bennet, Esq., Attorney for the Defendant.
A. M. Wattenberg, Esq., of Counsel.

The Commissioner: This case was submitted at the last hearing, and the defendant has written and submitted a brief of his own with care and interest, and I only regret the short time I have had for preparation of an opinion in the matter, has not been sufficient to permit me to discuss the case at great length.

85 However, I will state my conclusions briefly:

The indictment appears to be entirely sufficient.

The charge is conspiracy to hire and retain persons to enlist and go beyond the limits and jurisdiction of the United States of America, to be enlisted and enter into the service of a foreign people as soldiers, namely, an organization in the United Mexican States in revolt against the United Mexican States organized in the interest of one Felix Diaz and commonly known and called, "Felicistas," contrary to Section 10 of the Penal Code, as amended by the Act of May 7, 1917; and that at the time of the forming of the conspiracy and at the time of the commission and doing of the overt acts the United States was not engaged in war with the United Mexican States or with the "Felicistas."

It appears that the defendant was not in the Southern District of Texas where the indictment is found at the time of the alleged offense; that he was in New York, and engaged in promoting the cause of Felix Diaz in Mexico.

The actual presence of the defendant in the jurisdiction where the indictment is found is not a necessary element of proof to connect

him with such a conspiracy as is alleged.

86 As to the other facts, there is little conflict. It appears that one Foster Averitt, went to the defendant's office, substantially by chance, dressed in the uniform of a United States naval cadet; that he had recently resigned from the United States Naval Academy, and was seeking employment in the first instance, looking for engineering work; that after some talk with the defendant the subject of his entering the service of the Revolutionary forces operating in behalf of Feliz Diaz, was broached, and the defendant suggested that, if he should reach General Blanquet in Mexico, he would be made a Colonel in his army; that he would have to pay his own expenses to Mexico; that the defendant could not advance him any money, or promise him repayment of his expenses, as that would be a violation of the neutrality laws of the United States.

He suggested that it could be made up to him in some other way. The defendant then gave Averitt a letter addressed to General Blanquet in Mexico, and one addressed to one Naranjo, in Texas, and also gave him particular instructions in regard to the delivery of the letters and as to his own conduct.

Pursuant, 87 Averitt went to Mexico, presented the Naranjo letter, and after various conversations with him and others, endeavored to make his way into Mexico, but he was arrested at the border by Customs guards.

The hiring or retaining by the defendant or any other need not be by money or promise of it. The suggestion of appointment to a Colonely upon presentation of the defendant's letter to General Blanquet was an offering of inducement equivalent to a hiring.

I recognize fully the force and virtue of the expressions in the case of Hyde v. Shine, 199 U. S. 62, but the charge here is one of conspiracy, and the other persons named as conspirators are apparently all of them in the jurisdiction of where the indictment is found, while this defendant himself is a Mexican subject, and apparently only sojourning here.

It does not appear that he will be placed at great expense for counsel or for the attendance of witnesses, nor that he will be among strangers. It is evident that he has friends in the jurisdiction to which his removal is sought; that corroborative evidence, which is deemed important by him, of his absence from the jurisdiction at the time charged, can be readily furnished there, if required, although his own testimony in that respect is not disputed.

88 The defendant has not only failed to overcome a probative effect of the indictment in this proceeding for his removal, but the evidence adduced clearly indicates an issue which should be passed upon by a jury.

I shall and do hereby hold the defendant subject to the order of the court.

90

GOVERNMENT'S EXHIBIT 2.

(Also Defendant's Exhibit A.)

Robert Gayon, 320 Broadway, Room 706.

Nueva York, April de 1919.

Sr. Lic. D. Nemesio García Naranjo,
San Antonio, Texas.

Muy estimado Señor Licenciado:—

Tengo el gusto de presentar a Usted por medio de la presente al Señor Foster Averitt, Guardia de Marina de Los Estados Unidos de América, quien hace un viaje a México en comisión especial cerca de los Grales. Felix Diaz y Aurelio Blanquet, a fin de quw aw sirva Usted darle los informes necesarios y pueda hacer su viaje con la mayor rapidez posible.

Aprovecho esta oportunidad para informar a Usted quw mañana cambiaremos las oficinas de la Representación al No. 41 Park Row, Cuarto 801, y que le agradeceríamos se sirviére dar ese aviso por medio de la Revista.

Proximamente remitiré a Usted los retratos que desea de los Sres: Del Villar y Mariscal.

De Usted aftmo. atento amigo y s. s.
(Signed)

ROBERTO GAYON.

91

GOVERNMENT'S EXHIBIT 2A.

(Also Defendant's Exhibit D.)

Roberto Gayon, 41 Park Row. Room 801.

Nueva York, Abril 8 de 1919.

Er. Gral. D. Aurelio Blanquet,
Su Quartel General,
México, México.

Mi querido General:—

El portador de la presente Señor Foster Averitt, de la Guardia de Marina de los Estados Unidos, explicará a Usted los motivos de su viaje y los trabajos que estamos haciendo aquí. Ruego a Usted que, después de hablar con el Sr. Foster, se sirva presentarlo con el Sr. Gral. D. Felix Diaz, pues necesita traçar con Ustedes dos algunos asuntos.

Con motivo del feliz arribo de Usted a las playas mexicanas, concedí un reportazgo a la Prensa Asociada, al International News y a todos los periódicos que se publican aquí, consiguiendo que en todo el mundo se diera y comentara favor ablemente el viaje de Usted y

los motivos que inspiran el movimiento reorganizador encabezado por el Sr. Gral. Diaz. Desde el jueves hasta hoy se han seguido publicando reportazgos dados tanto por mi como por el Lic. Del Villar, que han causado profunda sensación en todos los círculos. El domingo se publicarán varias fotografías de Ustedes en The New York Tribune y otros periódicos, además de las que ya se publicaron en los diarios de mayor circulación. Estoy ahora esperando la llegada del Manifiesto para darle publicidad.

Los carrancistas creen que Usted está o en Yucatán o en el Estado de Michoacan, y el Embajador Bonillas esté furioso por la forma tan discreta como se arregló su viaje, y trata de investigar en qué forma le fueron extendidos sus pasaportes. El Consul de esta Ciudad ha hecho declaraciones tontas que han causado verdadera risa a todo el mundo. Creemos casi un hecho el reconocimiento de beligerancia, pero se espera ver algo relativo a la campana militar que van a emprender ahora Usted y el Sr. Gral. Diaz. En cuestión a fondos estamos ya también en vísperas de recibir.

Sírvase Usted escribir lo más frecuentemente posible para continuar la campaña de propaganda y ménndenos fotografías para reproducirlas aquí. Toda la prensa está de nuestra parte y en igual forma la opinión general del pueblo americano.

Todos en su casa están muy bien.

Mis felicitaciones y un apretado abrazo.

(Signed)

ROBERTO GAYON.

92

DEFENDANT'S EXHIBIT A

is a carbon copy of Government's Exhibit No. 2, which appears at page 90 of this record, the English translation of which is Defendant's Exhibit B.

93

DEFENDANT'S EXHIBIT B.

(Translation of Government's Exhibit 2 and Defendant's Exhibit A.)

Robert Gayon, 320 roadway, Room 706.

New York, April 8th, 1919.

Nemesio Garcia Naranjo, Lawyer,
San Antonio, Texas.

MY DEAR MR. LICENTIATE:—

Herewith I have the pleasure to introduce to you Mr. Foster Averitt, Marine Guard of the United States of America, who is undertaking a trip to Mexico on special commission near Generals Felix Diaz and Aurelio Blanquet. I kindly request from you to supply him the necessary information enabling him to make his trip as quick as possible.

I avail myself of this opportunity to inform you that we will move our offices to-morrow to 41 Park Row, Suite 901, thanking you in advance to give this notice by means of your Review.

Within a few days I will send the photographs of Messrs. Del Villar and Mariscal as per your request.

Yours very sincerely,
(Signed)

ROBERTO GAYON.

94

DEFENDANT'S EXHIBIT C.

Four letters in Spanish addressed by defendant to Nemesio Garcia Naranjo, dated respectively December 12, 1918, December 23, 1918, January 14th, 1919, and January 21st, 1919, English translations of which follow:

95 *English Translations of Defendant's Exhibit C.*

New York, N. Y., Dec. 12, 1918.

Sr. Lie. D. Nemesio Garcia Naranjo,
"Revista Mexicana," San Antonio, Tex.

MY DEAR SIR:

Without having received any letter from you I have the pleasure to confirm mine of the 22nd. of November last, relative to the advertisement of my work "El General Blanquet."

There are some reasons that you may know in the next few days for which I want a big circulation of the book, and I very kindly ask you to again put the advertise- in your accredited Review.

Also I want to know if it is possible to send you some copies of the book so that you can sell them at the offices of Revista Mexicana and if such, please state in the advertisement that the orders can be send there. I can send you all the copies you want, postage free, and you can add a 20% discount to cover advertisement and office expenses. If that proposition does not suit you, please let me know another way to do it.

I will await your letters hoping to give you good news in my next letter.

Yours very truly,
(Signed)

ROBERTO GAYON.

Roberto Gayon, 320 Broadway, Room 706.

New York, N. Y., Dec. 23, 1918.

Sr. Lie. D. Nemesio Garcia Naranjo,
San Antonio, Texas.

MY DEAR FRIEND:

I am just in receipt of your letter dated the 18th inst., for which I am most thankful to you.

With reference to the sale of the book entitled "El General Blanquet" I avail myself to inform you that the only thing we grieve is the lack of advertisement in the Review, as only with the one already published we have been selling quite a number of books without any difficulty, taking notice of different orders from Texas, Arizona, New Mexico and California. The price can not be reduced, as it cost us 45 cents a copy and to that we have to add postage. Furthermore, as you must know, I was forced to give away many copies and will have to give more latter on; so, I have to sell at least 800 copies to pay the printing cost, etc. Anyhow, I am sure that if we 96 publish the advertisement in the Review for some consecutive weeks, we will sell all the copies, as this little work has caused very good impression and is well solicited.

I have read with deep interest your opinion in regard to Mr. Vera Estanol's work. I do not feel myself with sufficient authority to discuss this matter, but it is the opinion of all that every new project, if it can be called new, only produces confusion amongst the poitical refugees and weakens the work already done with so many sacrifices. If the authors of that idea are craving only to save the Fatherland and are really inspired by disinterested principles, they very well could join the National Union Committees, which already have passed an embryonic state and now constitute a reality. To create new forces, yes, but only if such have the same center of co-ordination, for if it is different, doubts are sprung, activities are relaxed, and unity of action is lost. God grant us now, that we are on the threshold of success, we may leave aside our obstinate custom of projecting, and go ahead to produce results exclusively. Wishing you a happy christmas, etc.

(Signed)

ROBERTO GAYON.

Roberto Gayon, 320 Broadway, Room 706.

New York, Jan. 14th, 1919.

Sr. Lic D. Nemesio Garcia Naranjo,
Director de "Revista Mexicana,"
San Antonio, Texas.

MY DEAR FRIEND:

I am very much obliged to you for the advertisement of the book "El General Blanquet," in your Review.

Taking pains to studied your proposition as per recent letter that was duly answered, asking me to reduce the price of the book so that everybody could buy one, and in order to give it more publicity, even if it has to be made through sacrifices, I have the honor to inform you as follows hoping that you will approve my position:

The "Revista Mexican" is making an active propaganda to increase its readers. Anything we may do in that order, is not only a pleasure for those who claim your friendship, but a patriotic duty, as

your Review is the banner of the Mexican refugees. What better opportunity to help each other and obtain results?

My proposition is this: that Revista Mexicana is an special advertisement, between some other sujestions to increase its circulation, will offer a three months' subscription of same amounting to one dollar, and the book "El General Blanquet" which price is also a dollar, all for \$1.50. From that amount I will only get 50 cents for 97 each book sent to your new subscribers or to those who renew their subscriptions accepting the offer. In this way it does not appear that the book can be obtained now for less than its original price, as that would be an injury to the editorial credit of same and an injustice to those who already have payed one dollar. You will get the entire price of the subscription to the Review.

If you think this is convenient please let me know by return mail, stating the number of copies you want me to send, so as to be able to put the advertisement as soon as possible, either in the aforesaid way or any other you may think of.

Yours very truly,
(Signed)

ROBERTO GAYON.

January 21, 1919.

Sr. Editor de "Revista Mexicana,"
San Antonio, Texas.

MY DEAR FRIEND:

According to your instructions as per letter dated the 13th inst., I am sending a copy of my book "El General Blanquet" to Mr. M. Cavazos, P. O. Box 183, Laredo, Texas.

Thanking you for this order, I am very truly yours,

ROBERTO GAYON.

98

DEFENDANT'S EXHIBIT D

is a carbon of Government's Exhibit No. 2-a, which appears at page 91 of this record, the English translation of which is as follows:

English Translation of Defendant's Exhibit D (Government's Exhibit 2-a)

Roberto Gayon
41 Park Row
Room 801.

New York, April 8, 1919.

Gral. Aurelio Blanquet,
General Headquarters,
Mexico, Mexico.

MY DEAR GENERAL:

The bearer Mr. Foster Averitt, Marine Guard of the United States, will inform you about the reasons for his trip and of the work we are undertaking here. I kindly request from you, after

meeting Mr. Foster to be good enough to introduce him with General Felix Diaz, as he wants to take up some matters with both of you.

Due to your successful arrival to Mexican shores, I gave a statement to the Associated Press, to the International News, as well as to all the Newspapers published here, obtaining ample publication and favorable comment by the press of the whole world, of your trip and the motives that inspires the movement of reorganization headed by General Diaz. From Thursday last until this date, statements have been published, given out by myself as well as by Lic. del Villar, which have caused deep impression among all circles. Next Sunday various photographs of your good selves will be published in The New York Tribune and several other papers, besides those already published in the dailies of greater circulation. I am only awaiting the arrival of your Proclamation in order to give same publicity.

The Carrancistas believe that you are now in Yucatan or in the State of Michoacan, and Ambassador Bonillas is furious in view of the cautious arrangements made for your trip, and is trying to investigate by what means passports were granted to you. The Consul at this City has given out such foolish statements that caused division everywhere. We almost believe a fact the recognition of belligerancy; nevertheless, there is expectancy to hear something in regard to the campaign that you are about to undertake in connection with General Diaz. As to funds we are also expecting to receive same shortly.

Kindly be good enough to write as often as it is possible for you enabling us to continue our campaign of propaganda, and please send photographs to reproduce same here. All the press is with us together with the general opinion of the American people.

Everybody at home are well.

My best congratulations and a sincere embrace.

Yours very respectfully,

(Signed)

ROBERTO GAYON.

Department of Justice, Bureau of Investigation, Washington.

M. D. A. : E. N. D.

Address reply to Chief, Bureau of Investigation and refer to initials.

M. D. A.

February 27, 1919.

Pedro del Villar, Esq.,
320 Broadway,
New York, N. Y.

DEAR SIR:

Receipt is acknowledged of your communication, dated February 5, 1919, transmitting copy of a Proclamation issued by the National Reorganization Army of Mexico.

Very truly yours,

W. E. ALLEN,
Acting Chief.

100

Opinion of the Court.

UNITED STATES DISTRICT COURT,
Southern District of New York:

ROBERT GAYON, Petitioner,
against

THOMAS D. McCARTHY, United States Marshal for the Southern District of New York, and SAMUEL M. HITCHCOCK, United States Commissioner for the Southern District of New York, Respondents.

William S. Bennet, Attorney for Petitioner. (William S. Bennet and A. M. Wattenberg of Counsel.)

Francis G. Caffey, U. S. Attorney for Respondents, Peter B. Olney, Jr., Asst. U. S. Attorney, counsel.

AUGUSTUS N. HAND, *District Judge:*

This is an application for discharge of the petitioner who is held by the Marshal under a commitment pending an order for his removal to the Southern District of Texas. He is indicted in that District for engaging in a conspiracy to violate Section 10 of the U. S. Criminal Code which reads as follows:

"Whoever, within the territory or jurisdiction of the United States * * * hires or retains another person * * * 101 to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince, state, colony, district, or people, as a soldier, or as a marine or seaman on board of any vessel of war, shall be fined not more than one thousand dollars and imprisoned not more than three years."

The indictment charges a conspiracy on the part of Robert Gayon, Nemencio Garcia Naranjo and Santiago Mendoza to retain persons to go beyond the United States with intent to be enlisted and to enter the service of a foreign people as soldiers, to wit, an organization known as the Felicistas in Mexico.

The overt act which sets forth the facts connecting Gayon with the conspiracy is as follows:

"(a) On the 8th day of April A. D. 1919, the said Roberto Gayon, in the City of New York, State of New York, did write and deliver to one Foster Averitt a letter addressed to the said Nemencio Garcia Naranjo, and at said time did give to the said Foster Averitt certain instructions with reference to presenting said letter to the said Nemencio Garcia Naranjo and impliedly promising to the said Foster Averitt that upon his arrival in Mexico he would be given a commission in the army of one Aureliano Blanquet, and on the same date, at the same place did deliver to the said Foster Averitt a letter to one

D. Aureliano Blanquet, who was then in Mexico and was represented to be in command of certain revolutionary forces in opposition to the established Government of the United Mexican States, operating and acting in the interest of one Felix Diaz."

Robert Gayon was the secretary in New York of one Del Villar, who represented General Felix Diaz there, and was also under pay of General Blanquet and the secretary of the latter.

102 Averitt, who had been a midshipman in the United States Navy, called at the office of these men, and testified before the Commissioner to the following conversation with Gayon:

"I started to talk with him about Mexico. He said, Why don't you go to the Mexican Embassy? I said something about there being representatives of the Carranzista Government. Then he smiled and invited me to sit down, and I said, I suppose you need some men who understand military matters—I was in uniform at the time.

"Q. In what uniform were you in at the time?

"A. The uniform of midshipman of the United States Navy.

"Q. You had been a midshipman in the United States Navy?

"A. Yes, sir.

"Q. What did he say to that?

"A. He said that on account of the neutrality laws, that they couldn't accept any, but that they might have need of some, but that on account of the—and then I asked him if there would be any opportunity for me there.

"Q. What did he say to that?

"A. He said that on account of the neutrality laws he would be unable to give me any kind of commission, or accept my services in Mexico, but I pressed the matter and he offered, he said to come back Monday—you see this was Saturday—and we would talk the matter farther. I went back Monday and saw him again, and Monday I met another Mexican whom I believe to be the man there. I am not certain as to that.

103 "Q. What did Mr. Gayon say and what did you say on Monday when you came back?

"A. He said that he had talked the matter over with Senor Del Villar, and they thought, the fact that I had been in the United States Navy would be the best possible recommendation.

"Q. And then what happened?

"A. And that he couldn't give me a commission on account of fear of violation of the neutrality laws, but he could give me a letter of introduction to General Diaz and * * * to General Blanquet.

"We discussed the matter of getting down there, and he also said it would be a violation of the neutrality laws to advance me money for the purpose—well, I knew that—and none was advanced.

"I was to go down on the Ward Line, you see, to Vera Cruz, but on account of difficulties in getting a passport—you can't get them in a hurry—and there were several declarations in there that

I didn't care to make—I asked him if it were possible to cross the Rio Grande River. He said he thought it would be if I cared to go down overland, and for that I should see Senor Nemencio Garcia Naranjo—he is the editor of the Revista Mexicana, Mexican Review at San Antonio.

"He said he would give me a letter of introduction to him so I went back—

"Q. Next day?

"A. I believe it was the next day.

"Q. Have you a memorandum there?

"A. Yes, sir, it was the 8th. I went back the morning of the 8th and he wrote me two letters, one to General Blanquet and one to Garcia Naranjo.

* * * * *

"Q. Was there any further conversation with Mr. Gayon on that day?

"A. Well, on the day before, we discussed the condition of affairs in Mexico in general, and we also discussed the location 104 of several of the forces down there, particularly General Diaz, Paso del Mareho, General Almazon, across the border.

"Q. Was there anything said by Mr. Gayon and by you at that time, as to the possibility of your getting a commission in the Army of General Blanquet or Felix Diaz?

"A. Well, I asked him that, yes, sir.

"Q. What did you say to him, please?

"A. I asked him for assurance that when I went down there, it would not be for nothing. He wouldn't give me a commission here, and he said there would be no difficulty in my getting a commission from General Blanquet, and he said to tell General Blanquet to put me on his personal staff."

Averitt testified that he had a conversation with Gayon about a refund of his expenses down to Texas and he said it might be possible to have them made up in Mexico. He received letters of introduction to General Blanquet and Naranjo and \$15 from Mendoza on arriving in Texas. He was apprehended when attempting to cross the border.

The testimony of Averitt, which so far as pertinent, has been substantially quoted in full seems if credited to establish probable cause to believe that Gayon was engaged in a conspiracy to retain Averitt to go to Mexico with intent to enter the service of a foreign state as a soldier. I think the testimony indicated an engagement on the part of Gayon to go to General Blanquet to serve in his army 105 in return for a letter of introduction intended to promote this result. No payment of money or formal contract is necessary to bring the case within the statute. If money had been furnished for maintenance, the case would have been clearer, but the giving of letters of introduction to those who could facilitate an enlistment with the expectation that that would follow, accompanied by the direction to Averitt to tell Blanquet to place Averitt

on his staff, and the arrangement on Averitt's part to go to Mexico, can properly be found by a jury to amount to a retention of Averitt to go with intent to enlist. Moreover, it is to be remembered that Gayon has testified that he was under the pay of General Blanquet, and his secretary. Under such circumstances a letter to the latter with instructions to Averitt to tell Blanquet to place Averitt on his personal staff is some evidence of a promise by Gayon to Averitt that Averitt would receive a commission. The statement by Gayon that he could promise nothing on account of the neutrality laws may have merely showed a desire to evade the law. Actions can speak louder than words. Whether Gayon really was promising nothing is, I think, a question for the jury.

The indictment is *prima facie* evidence of probable cause. The facts set forth in it establish a conspiracy unless met by positive testimony offered by Gayon. The witnesses called as to his connection with it tend to sustain the allegations as to him.

106 The case comes within the rule laid down in the cases of *United States v. Blair-Murdock Co. et al.*, 228 Fed. 77; and *United States v. Herz*, Fed. Cas. No. 15,357, and was properly disposed of by the commissioner.

The writ of habeas corpus should be dismissed and the prisoner remanded.

A. N. H., D. J.

August 5, 1919.

107 *Order Dismissing Writs of Habeas Corpus and Certiorari.*

At a Stated Term of the United States District Court for the Southern District of New York, Held at the Court House in the Borough of Manhattan, New York City, the 19th day of August, 1919.

Present: Hon. Augustus N. Hand, District Judge.

ROBERTO GAYON, Petitioner,
against

THOMAS D. McCARTHY, United States Marshal for the Southern District of New York, and Samuel M. Hitchcock, Commissioner for the Southern District of New York, Respondents.

A writ of habeas corpus having issued from this court on the 18th day of June, 1919, to the respondent Thomas D. McCarthy, upon the petition of Roberto Gayon, above named, verified the 18th day of June, 1919, alleging that the said Roberto Gayon was restrained of his liberty by the said Thomas D. McCarthy without authority of law, and a writ of certiorari in aid of said writ of habeas corpus having been issued to the said Samuel M. Hitchcock on the 18th day of June, 1919, and the matter coming on to be heard on the 3rd day of July, 1919. Now on reading and filing the petition and the return of the respondent Thomas D. McCarthy, verified the — day of — 1919, and the the return of the respondent Samuel M. Hitchcock,

verified the 26 day of June, 1919, and the traverse of the petitioner Roberto Gayon to the return of the respondent, verified the 3rd day of July, 1919, and after hearing William S. Bennet, attorney for the petitioner in support of said motion, and Peter B. Olney, Jr., assistant United States Attorney opposed, and the United States Attorney having applied for the issuance of a warrant of removal pursuant to section 1014 of the United States Revised Statutes, and due deliberation having been had, it is hereby

108 Ordered that the said writ of habeas corpus and the said writ of certiorari be and the same hereby are in all respects dismissed, and that the petitioner above named Roberto Gayon be and he hereby is remanded to the custody of the respondent Thomas D. McCarthy as United States Marshal for the Southern District of New York, and it is further

Ordered that a warrant issue forthwith pursuant to section 1014 of the Revised Statutes for the removal of the said Roberto Gayon to the Southern District of Texas, and it is further

Ordered that in case the said Roberto Gayon shall procure an appeal and cause the transcript of the record herein to be filed in the court to which said appeal is taken on or before the 15th day of September, 1919, then and in that event the execution of said warrant of removal shall be stayed pending a final determination of said appeal.

AUGUSTUS N. HAND,
U. S. D. J.

Filed August 19, 1919.

109 *Petition for Appeal and Order Allowing Appeal.*

United States District Court, Southern District of New York.

ROBERTO GAYON, Petitioner,

against

THOMAS D. McCARTHY, United States Marshal for the Southern District of New York, and Samuel M. Hitchcock, United States Commissioner for the Southern District of New York, Respondents.

In the Matter of the Petition of Roberto Gayon for a Writ of Habeas Corpus and a Writ of Certiorari in Aid Thereof.

The petition of the above named petitioner for an order allowing an appeal to the Supreme Court of the United States from the final order hereinbefore entered in this cause respectfully shows:

I. That the petitioner above named is a resident of the Borough of Brooklyn, City of New York, Southern District of New York, United States of America, and was such resident at all the times hereinafter mentioned.

II. The petitioner above named feeling himself aggrieved by the final order made and entered in this court on the 19th day of August 1919, whereby it was ordered that the application for a writ of habeas corpus directed to Thomas G. McCarthy, United States Marshal in and for the Southern District of New York, requiring said Marshal to bring and have your petitioner before this court, and that his application for a writ of certiorari in aid thereof directed to the Hon. Samuel H. Hitchcock, United States Commissioner for the Southern District of New York, commanding him to return all proceedings against your petitioner to the said District Court for the Southern District of New York for such action as might be proper in the premises being denied, your petitioner's writ of habeas corpus dismissed, and your petitioner remanded.

110 Now comes William S. Bennet, his solicitor and counsel and petitions the court for an order allowing him to prosecute an appeal from said final order to the Supreme Court of the United States under and according to the laws of the United States in that behalf made.

III. Your petitioner is advised by counsel that there are grave doubts as to whether the proceedings referred to in the petition have not infringed the constitutional rights of your petitioner and whether the commitment of your petitioner and the restraint of his person referred to in said petition are not without authority of law, and whether the said United States Commissioner before whom your petitioner was arraigned, as set forth in said petition, had jurisdiction either to require bail of your petitioner or to commit your petitioner in default thereof, and is further advised by his said counsel that he is of the opinion that your petitioner's constitutional rights have been infringed by the said proceedings, and that the detention under and by virtue of the said commitment issued by the said Commissioner as referred to in the said petition, and the denial of his discharge upon said writs of habeas corpus and certiorari are in violation of his rights under the Constitution of the United States, and your petitioner desires in good faith to submit the constitutional question and such other questions as are presented to the Supreme Court of the United States for their determination, and he prays that his appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said order was made duly authenticated

111 may be sent to the Supreme Court of the United States, and for the relief asked herein, your petitioner will ever pray.

Dated, New York, August 19 1919.

ROBERTO GAYON,
Petitioner.

WILLIAM S. BENNET,
Attorney for Petitioner, 280 Broadway,
Manhattan Borough, New York City.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Roberto Gayon, being duly sworn, deposes and says that he has read the foregoing petition and knows the contents thereof, and that the same is in all respects true.

ROBERTO GAYON.

Sworn to before me this 19th day of August, 1919.

CHARLES M. SCHUMACHER,
Notary Public, N. Y. Co.

The foregoing petition and appeal is granted and it is ordered that pending said appeal said petitioner Roberto Gayon be released on bail to await the decision and determination of said appeal, said bail being fixed at the sum of \$5000.

Supersedeas bond fixed at \$250.

Dated New York, August 19, 1919.

AUGUSTUS N. HAND,
United States District Judge.

Filed Aug. 19, 1919.

112

Assignments of Error.

United States District Court, Southern District of New York.

ROBERTO GAYON, Petitioner-Appellant,
against

THOMAS D. McCARTHY, United States Marshal for the Southern District of New York, and Samuel M. Hitchcock, United States Commissioner for the Southern District of New York, Respondents-Appellees.

Now comes the petitioner and appellant Roberto Gayon by William S. Bennet, his attorney and counsel, and in connection with his petition for the allowance of an appeal to the Supreme Court of the United States from the order of this court made and entered the 19th day of August 1919, dismissing the writs of habeas corpus and certiorari and remanding your petitioner, makes and files the following assignments of error.

The Court erred

I. In dismissing the said writs of habeas corpus and certiorari and remanding your petitioner to custody.

II. In holding that your petitioner's restraint and detention under the commitment mentioned in the petition were not without authority of law.

III. In holding that your petitioner was not deprived of his liberty under such commitment in violation of his rights, privileges and immunities under the constitution and laws of the United States.

IV. In holding that the evidence given before Samuel M. Hitchcock, Esq., the Commissioner, and upon which he issued the 113 said commitment showed probable cause to believe that your petitioner had been guilty of any crime or offence charged in the indictment.

V. In failing to hold and decide that by the proof before the Commissioner and before said Court, it was shown that there was not probable cause to believe that your petitioner was guilty of the crime or offence charged in the indictment.

VI. In failing to hold and decide that the only acts committed by the petitioner of which there was any proof or evidence before the Commissioner or before said Court, did not constitute a crime under Section X of the U. S. Penal Code as amended by the Act of May 7, 1917.

VII. In not holding and deciding that your petitioner was deprived of his liberty without due process of law within the meaning of the 5th amendment to the Constitution of the United States.

VIII. In construing Section 1014 of the Revised Statutes as authority for your petitioner's removal to the Southern District of Texas upon the facts disclosed in the said petition and on the evidence before said Commissioner and before the said court.

Wherefore your petitioner prays that the order dismissing said writs of habeas corpus and certiorari and remanding your petitioner be reversed, and that your petitioner be discharged from custody.

ROBERTO GAYON,
Petitioner and Appellant.

WILLIAM S. BENNET,
Attorney for Petitioner and Appellant,
280 Broadway, New York City.

Filed August 19, 1919.

114 By the Honorable Augustus N. Hand, One of the Judges of the District Court of the United States for the Southern District of New York, in the Second Circuit, to Thomas D. McCarthy, United States Marshal of the Southern District of New York, for the Southern District of New York, and Samuel M. Hitchcock, United States Commissioner for the Southern District of New York, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, District of Columbia, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the District Court of the United

States for the Southern District of New York, wherein Roberto Gayon is appellant and you are appellees to show cause, if any there be, why the order in said writ of error mentioned should not be corrected, and speedy justice should not be done in that behalf.

Given Under My Hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 19th day of August, in the year of our Lord One Thousand Nine Hundred and Nineteen, and of the Independence of the United States the One Hundred and Forty Fourth.

[Seal District Court of the United States, Southern District of N. Y.]

AUGUSTUS N. HAND,
*Judge of the District Court of the United States
for the Southern District of New York,
in the Second Circuit.*

114½

[Endorsed:]

Index No. M4109.

United States Supreme Court.

Roberto Gayon, Plaintiff in Error,
against

Thomas D. McCarthy, United States Marshal for the Southern District of New York, and Samuel M. Hitchcock, Commissioner for the Southern District of New York, Defendants in Error.

Original.

Citation.

William S. Bennet, Attorneys for Plaintiff in Error, 280 Broadway, Borough of Manhattan, New York City.

Admission of Service.

Due service of a copy of the within Writ of Error is admitted the 27th day of August, 1919. Francis G. Caffey, U. S. Atty., Attorney for Defendants in Error.

Filed Aug. 27, 1919. U. S. District Court, S. D. of N. Y.

115

Stipulation.

United States District Court, Southern District of New York.

ROBERTO GAYON, Plaintiff-in-Error,
against

THOMAS D. McCARTHY, United States Marshal for the Southern District of New York, and Samuel M. Hitchcock, United States Commissioner for the Southern District of New York, Defendants-in-Error.

It is hereby stipulated that the foregoing papers contain a true and complete transcript of the record of proceedings had in the above entitled cause, as set forth in the praecipe and stipulation, and comparison by the clerk of the District Court of the United States for the Southern District of New York, is hereby waived.

Dated September 3, 1919.

WILLIAM S. BENNET,
Attorney for Plaintiff-in-Error.
FRANCIS G. CAFFEY,
Attorney for Defendants-in-Error.

Endorsed on cover: File No. 27,295. S. New York, D. C. U. S. Term No. 540. Roberto Gayon, appellant and plaintiff in error, vs. Thomas D. McCarthy, United States Marshal for the Southern District of New York, and Samuel M. Hitchcock, United States Commissioner for the Southern District of New York. Filed September 9, 1919. File No. 27,295.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

ROBERTO GAYON, APPELLANT,
v.
THOMAS D. McCARTHY, UNITED STATES
Marshal for the Southern District of New York, and Samuel M. Hitchcock,
United States Commissioner for the Southern District of New York.

} No. 540

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION ON BEHALF OF APPELLEES TO ADVANCE.

Comes now the Solicitor General on behalf of the appellees, and respectfully moves the advancement of the above-entitled cause for argument during the present term.

Appellant was indicted in the Southern District of Texas for conspiracy to violate Section 10, Criminal Code, in that he conspired to retain persons to go beyond the limits of the United States with intent to be enlisted as soldiers with one of the Mexican factions. He was apprehended in the Southern District of New York, and committed by the United States

Commissioner to the custody of the Marshal pending an order for his removal to Texas. This is an appeal from an order of the District Court dismissing the writs of habeas corpus and certiorari theretofore granted.

Pending the determination of this appeal, appellant is at liberty on bail. It is, therefore, respectfully requested that the case be set for early hearing.

Notice of this motion has been served upon opposing counsel.

ALEX. C. KING,
Solicitor General.

NOVEMBER, 1919.



DEC 23 1919

JAMES D. MAHER,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 540

ROBERTO GAYON,
Plaintiff-in>Error,

vs.

THOMAS D. McCARTHY, United States Marshal
for the Southern District of New York, and
SAMUEL M. HITCHCOCK, United States
Commissioner for the Southern District of
New York.

IN ERROR TO THE DISTRICT COURT OF THE UNITED
STATES FOR THE SOUTHERN DISTRICT
OF NEW YORK.

**BRIEF ON BEHALF OF PLAINTIFF-
IN-ERROR.**

WILLIAM S. BENNET,
Counsel for Plaintiff-in>Error.



Supreme Court of the United States

OCTOBER TERM, 1919; NO. 540.

ROBERTO GAYON,
Plaintiff-in-Error,
against

THOMAS D. McCARTHY, United
States Marshal for the South-
ern District of New York, and
SAMUEL M. HITCHCOCK, Unit-
ed States Commissioner for
the Southern District of New
York.

IN ERROR TO THE DISTRICT COURT OF THE UNITED
STATES FOR THE SOUTHERN DISTRICT
OF NEW YORK.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

Statement.

Defendant (plaintiff-in-error) was indicted in the Southern District of Texas for conspiring to hire and retain persons to enlist and go to Mexico with intent to be enlisted as soldiers in the service of an organization in the United Mexican States in revolt against the United Mexican Government,

contrary to Section 10 of the Penal Code, as amended.

Defendant was arrested in the City of New York, Southern District of New York, and after a hearing was committed by United States Commissioner Hitchcock to the custody of the Marshal pending an order for his removal to Texas.

Defendant thereupon obtained from the United States District Court for the Southern District of New York a writ of habeas corpus and a writ of certiorari in aid thereof, and from the final order of the District Court dismissing said writs, the writ of error herein was allowed.

The indictment referred to contains the general charge of conspiracy and enumerates seven overt acts committed as a part and in furtherance of said conspiracy.

The only allegations of fact in the conspiracy relating to the said Roberto Gayon, defendant, are contained in sub-division (a) of the said indictment (Record, page 7), which is as follows:

"(a) On the 8th day of April, A. D., 1919, the said Roberto Gayon in the City of New York, State of New York, did write and deliver to one Foster Averitt, a letter addressed to the said Nemencio Garcia Naranjo, and at said time did give to the said Foster Averitt certain instructions with reference to presenting said letter to the said Nemencio Garcia Naranjo, and impliedly promising to the said Foster Averitt that upon his arrival in Mexico he would be given a commission in the Army of Aurelio Blanquet and on the same day at the same place did deliver to the said Foster Averitt a letter to one D. Aurelio Blan-

quet, who was then in Mexico and was represented to be in command of certain revolutionary forces in opposition to the established government of the United Mexican States operating and acting in the interest of one Felix Diaz."

Upon the hearing before the commissioner it appeared from the witnesses produced on behalf of defendant that at no time during 1918 or 1919 was he personally in Texas where the conspiracy is alleged to have been entered upon. Furthermore, defendant testified that he had not in any way communicated with any of the persons in Texas who are alleged in the indictment to be his co-conspirators, except Naranjo, to whom he had written several letters, which were admitted in evidence (Record, pages 48-50), and to whom the letter referred to in subdivision (a) of the indictment was addressed (Record, page 7).

On the other hand, the prosecution produced as evidence of the commission of the alleged crime, first, the indictment (Record, page 6), and second, the testimony of one Foster Averitt, the person named in the indictment as having received from the defendant Gayon, the letter to his alleged co-conspirator Naranjo (Record, page 31).

The ground upon which defendant was held for removal was that the proofs before the commissioner established the commission of a crime under Section 10 of the Penal Code.

Assignment of Errors.

Plaintiff in error contends that the court below erred:

4

(1) In failing to hold and decide that the only acts committed by defendant of which there was any evidence before the commissioner or before the court did not constitute a crime under Section 10 of the U. S. Penal Code, as amended.

(2) In holding that the evidence adduced before the commissioner showed probable cause to believe the defendant guilty of any crime or offence charged in the indictment.

POINT I.

The indictment is not conclusive; it is merely prima facie evidence of probable cause under Section 1014 of the revised statutes.

Tinsley vs. Treat, 205 U. S., 20.

POINT II.

There was no hiring or retaining by defendant within the meaning of Section 10 of the Penal Code.

It is apparent from the record that the commissioner's ruling was upon the theory that the defendant hired and retained the witness Averitt to go to Mexico to enlist in the revolutionary forces operating there against the United Mexican Government (Record, page 46).

The commissioner said in part:

"The hiring or retaining by the defendant or any other need not be by money or promise

of it. The suggestion of appointment to a Coloneley upon presentation of the defendant's letter to General Blanquet was an offering of inducement equivalent to a hiring."

The opinion of the court (Record, page 55) discloses that the order was based upon his conclusion that as a matter of law the testimony of Averitt established probable cause to believe that defendant was engaged in a conspiracy to retain Averitt to go to Mexico with intent to enlist there as a soldier and that such testimony indicated that defendant actually retained and hired Averitt for such purpose. The court said in part:

"The testimony of Averitt, which so far as pertinent, has been substantially quoted in full seems if credited to establish probable cause to believe that Gayon was engaged in a conspiracy to retain Averitt to go to Mexico with intent to enter the service of a foreign state as a soldier. I think the testimony indicated an engagement on the part of Gayon to go to General Blanquet to serve in his army in return for a letter of introduction intended to promote this result. No payment of money or formal contract is necessary to bring the case within the statute. If money had been furnished for maintenance, the case would have been clearer, but the giving of letters of introduction to those who could facilitate an enlistment with the expectation that that would follow, accompanied by the direction to Averitt to tell Blanquet to place Averitt on his staff, and the arrangement on Averitt's

part to go to Mexico, can probably be found by a jury to amount to a retention of Averitt to go with intent to enlist.

A brief summary of the testimony of the prosecution's witness Averitt follows:

Averitt had come to 320 Broadway accidentally. He had seen the name of Pedro del Villar and he had gone up hoping possibly to get a position of an engineering character. He was in the uniform of a cadet of the Naval Academy of Annapolis from which he had quite recently resigned. He suggested that on account of his military experience he might be of benefit to the anti Carranzista side in Mexico, and Mr. Gayon told him he could not promise him anything or do anything for him because to do so would be a violation of the neutrality law of the United States. Upon his continuing to express his willingness to join himself to Blanquet and Diaz, Mr. Gayon gave him a letter of introduction to Mr. Naranjo. He cautioned him not to tell Mr. Naranjo that he wanted to go to Mexico, in order to attach himself to General Blanquet. Mr. Gayon said the reason he did that was because San Antonio was full of spies.

Mr. Gayon did not give him, Averitt, any money and he did not ask for any, but in the conversation Gayon did say that if Averitt got to General Blanquet, he was to say to General Blanquet that he, Gayon, hoped that Averitt would be put on Blanquet's personal

7

staff and Gayon told Averitt that he would have the rank of at least Colonel. He also told Averitt that while there was no provision for expenses, that undoubtedly if he did become an officer under General Blanquet, he would more than make up the amount he had expended in getting to General Blanquet.

An examination of the testimony in question discloses that there was no hiring or retaining of him within the meaning of the statute.

Section 10, of the Penal Code, as amended by the Act of May 7, 1917, is as follows:

"Whoever within the territory or jurisdiction of the United States, enlists or enters himself, or hires or retains another person to enlist or enter himself or to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince, state, colony, district, or people as a soldier or as a marine or seaman on board of any vessel of war, letter of exchequer or privateer, shall be fined not more than One thousand dollars and imprisoned not more than three years provided * * *."

To establish an offense under the section aforesaid, it must be shown that there was a distinct hiring or retaining by the defendant.

United States vs. Kazinski, 26 Fed. Cases, 682;

United States vs. Hertz, 26 Fed. Cases 293;

United States vs. Blair-Murdock Co., 228
Fed. 77.

As was said in United States vs. Hertz, *supra*:

"The question upon which you have to pass is, did Henry Hertz hire or retain any of the persons named in these bills or indictments to go beyond the limits of the United States with the intent to be enlisted or entered in the service of a foreign state. Did he hire or retain a person? Whatever he did was within the territory of the United States. The hiring or retaining does not necessarily include the payment of money on the part of him who hires or retains another. He may hire or retain a person with an agreement that he shall pay wages when the service shall have been performed. The hiring or retaining of servants is not done by the payment of money in the first instance, but by the promise to pay money when the service shall have been performed; and so a person may be hired or retained to go beyond the limits of the United States with that intent. Moreover, it is not necessary that the consideration of the hiring shall be money. To give to a person a railroad ticket that costs \$4 and board and lodge him for a week is as good as a consideration for a contract of hiring as to pay him the money with which he could buy the railroad ticket and pay for the board himself. *If there be any engagement on the one side to do the particular thing, to go beyond the limits of the United States with the intent to enlist and on the other side an engagement that when the act shall have*

been done a consideration shall be paid to the party performing the service or doing the work the hiring and retaining are complete.

The meaning of the law is this. That if any person shall engage, hire, retain or employ another person to go outside of the United States to do that which he could not do if he remained in the United States, viz: to take part in a foreign quarrel, if he hires him to go knowing that it is his intent to enlist when he arrives out—to enlist and engage him or carry him or pay him for going because it is the intent of the party to enlist; then the offence is complete * * *. It is the hiring of the person to go beyond the United States, that person having the intention to enlist when he arrives and that intention known to a party, hiring him and that intention being a portion of the consideration before he hires him, that defines the offense."

In United States vs. Blair-Murdock Co., 228 Federal 77. The court, by Dooling, D. J., says, page 84:

"The only difficulty that really presents itself is to determine what is meant by the words 'hires or retains another person to go beyond the limits or jurisdiction of the United States.' And, indeed, as it was the manifest purpose and intention of defendants that those sent by them from San Francisco should go beyond the limits of the United States, and as it was equally the purpose of the men so sent to go beyond such limits our inquiry is narrowed to

the ascertainment of the meaning of the words 'hires or retains,' as used in the statute, and to determining whether such meaning applies to the things for the doing of which the defendants were associated. *To hire in its ordinary signification, and we should here seek no other means:*

'To contract for the labor and services of, for a compensation; to engage the services of, employ for wages, salary, or other consideration; to engage the interest of, agree to pay for the desired action or conduct of.'

And this has been the meaning of the word since it was first used in the statute in question and its predecessors. It is not essential to a hiring that the consideration be pecuniary or that it be paid at once * * * "(page 84).

"And in an exhaustive opinion rendered by Attorney General Cushing in that same year is found the following:

'It is possible that he may have supposed that a solemn contract of hiring in the United States is necessary to constitute the offense. That would be a mere delusion. The words of the statute are 'hire or retain.' It is true our act of Congress does not expressly say, as the British act of Parliament does, 'whether any enlistment money, pay, or reward shall have been given or not;' nor was it necessary to insert these words. A party may be retained by verbal promise, or by invitation, for a declared or known purpose. If such a statute could be evaded or set at naught by elaborate contrivances to engage without enlisting, to

retain without hiring, to invite without recruiting, to pay recruiting money in fact, but under the name of board, passage money expenses, or the like, it would be idle to pass acts of Congress for the punishment of this or any other offense.'

"I have adopted these quotations because they seem to me to state accurately the meaning of the law, to be well within its terms, and to afford the only construction that will render it effective for the purpose for which it was intended" (page 85).

It is our earnest contention that in order to establish a crime under Section 10, there must be an actual hiring or retaining,—that aid, assistance or inducement is not sufficient under the strict language and interpretation of the statute.

Averitt may have been exceedingly anxious to go to Mexico to enlist therein as a soldier, and defendant Gayon may have made many suggestions to make Averitt more eager and may have done many things to assist him to carry out this desire and intent, but such suggestions and assistance are no crime under the statute, *for the necessary element is the hiring or retaining.* That is lacking.

The suggestions made by defendant Gayon may have been of great weight in inducing Averitt to go to Mexico. Even if they had been the inducing cause of his desire to go and his subsequent going, they would still not amount to the necessary hiring or retaining contemplated by the statute.

As said in United States vs. Hertz and United States, vs. Blair-Murdock Co. *supra*, the words

hire and retain denote an engagement on the one side to do the particular thing and on the other side to give consideration therefor.

Here there was no obligation assumed by Gayon in any respect either for himself or for another—no promise, express or implied, made by him—and unless it be shown that he actually employed, hired, engaged or retained the said Averitt to go to Mexico for the purpose of enlisting as a soldier, whether the said obligation was assumed by Gayon either for himself or for another, there was no crime under Section 10 of the Penal Code.

The assistance given by the defendant Gayon even if given with the knowledge that Averitt intended to go to Mexico for the purpose of enlisting as a soldier falls far short of the hiring and retaining necessary to constitute a crime, and the testimony of Averitt clearly shows that Gayon did nothing more than assist the witness.

In *United States vs. Kazinski, supra*, it was held to be no offence to transport out of this country, with their own consent, persons who had an intention to enlist as soldiers in a foreign country.

It was there said by Sprague, D. J.:

“A distinct hiring or retaining by the defendant must be shown * * *. If a captain of a vessel should know that all his passengers were going out of the United States for the purpose of enlisting or were hired or retained to go, he would not be liable * * *. It would be no crime to obtain a ticket or hire a cab for a person who was hired or retained to go beyond the limits of the United States to enlist.”

The letter which defendant Gayon addressed to Naranjo (Exhibit B, Record, page 48) and gave to the witness Averitt is merely a letter of introduction and read in the light of the testimony of Averitt and Gayon, was given innocently and without unlawful intent.

It follows that there was no hiring or retaining by defendant in violation of the statute under consideration.

POINT III.

The prima facie evidence afforded by the indictment was conclusively overcome not only by the testimony of defendant's witnesses but also by the proofs adduced by the prosecution.

Ordinarily an indictment, if sufficient in law, would suffice to constitute the basis for a finding of probable cause, but where, as here, the evidence upon which the indictment was found is produced, and that evidence negatives the commission of the crime charged, the indictment ceases to support a finding of probable cause.

The prosecution did not claim that defendant Gayon was in Texas. The overt act alleged upon which the prosecution relies as connecting defendant Gayon with the conspiracy is set forth in subdivision (a) of the indictment (Record, page 7). To prove the commission of this overt act the witness Averitt was brought from Texas and questioned at length (Record, pages 31 to 40).

If the testimony of the said Averitt was to the effect that a crime against the laws of the United

States had been committed by defendant Gayon, there would be ground upon which defendant Gayon should be held, but such is not the case.

The overt act with which the defendant Gayon is charged in subdivision (a) of the indictment constitutes in itself no crime.

While the overt act in question might, if done under and as part of the design of the alleged conspiracy, be competent to support the finding of probable cause, yet where no conspiracy is in any wise proved by or inferrable from the evidence adduced, and the overt act from the surrounding circumstances appears to be innocent of wrong, the overt act is without weight insofar as a finding of probable cause may be predicated thereon.

For it is obvious that to constitute an overt act in furtherance of a conspiracy, the act must be done with the intent that it shall be for the purpose of achieving the object of the conspiracy. No such unlawful intent appears in the instant case.

A careful perusal of the entire record fails to disclose one dot of proof tending directly or inferentially to connect defendant with the conspiracy charged.

There are seven overt acts set forth as being done pursuant to the alleged conspiracy. It is only to one of these that defendant Gayon is shown to be a party.

It is apparent that the only link by which the prosecution hoped or attempted to fasten the conspiracy upon defendant Gayon was his transaction in relation to the witness Averitt and the letter of introduction to the alleged conspirator Naranjo.

To do so the government brought from Texas Averitt, who testified as to his conversations with

defendant Gayon in the City of New York and the delivery to him of the letter of introduction which was placed in evidence (Exhibit B, Record, page 48).

The evidence thus produced failed to support the indictment. The indictment in sub-division (a) sets forth that defendant gave to the witness Averitt certain instructions with reference to presenting said letter to one Naranjo and impliedly promising to the said Averitt that upon his arrival in Mexico he would be given a commission in the army of Aurelio Blanquet. The testimony of Averitt not only shows that no instructions were given to him, but also that no promise, express or implied, was made to him by defendant Gayon.

It is obvious that the only testimony to be obtained as to the conversation between defendant Gayon and Averitt is to be procured from the mouths of Gayon and Averitt. Their testimony is practically in accord to the effect that no instructions with reference to presenting the letter were given and that no promise, express or implied, was made by Gayon to Averitt. If the indictment is to be supported, only the testimony of Averitt can support it. Where such testimony contradicts the indictment, the indictment does not support a finding of probable cause.

Furthermore, if the overt act as alleged in the Indictment (Subdivision A) did constitute a crime under Section 10 of the Penal Code, such allegations, for the purpose of the hearing, were displaced by the testimony given by the witness Averitt. The allegations must be ignored and recourse must be had to his testimony to find support for its proof.

The testimony of Averitt, as before argued, fails to establish the charge that defendant Gayon was guilty of any crime, for there was no hiring or retaining within the statute.

It is urged there was no probable cause for believing defendant to have committed the crime charged in the indictment.

POINT IV.

The order of the United States District Court should be reversed and defendant discharged from custody.

Respectfully submitted,

WILLIAM S. BENNET,
Counsel for Plaintiff-in>Error.

A. M. WATTENBERG,
on the Brief.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

ROBERTO GAYON, PLAINTIFF IN ERROR,
v.
THOMAS D. McCARTY, UNITED STATES
Marshal for the Southern District of
New York,
and
SAMUEL M. HITCHCOCK, UNITED STATES
Commissioner for the Southern District
of New York.

No. 540.

*IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK.*

BRIEF ON BEHALF OF DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

This writ of error is sued out to review the judgment of the District Court for the Southern District of New York dismissing a writ of habeas corpus applied for by the plaintiff in error. The petition for said writ recited that the petitioner was in the custody of the defendant in error, McCarty, under a commitment issued by the defendant in error, Hitchcock, holding him for removal to the Southern District of

Texas to answer there an indictment preferred against him for a conspiracy to violate section 10 of the Criminal Code. At the hearing before the commissioner a certified copy of the indictment pending against the defendant in the Southern District of Texas was offered in evidence, and the identity of the defendant was admitted. Thereupon the commissioner heard evidence on behalf of the defendant and rebutting evidence on behalf of the Government as to whether probable cause was shown for holding the defendant upon the charge in question, and held that the evidence adduced clearly indicated an issue which should be passed upon by a jury (R. 46), and accordingly issued the commitment referred to above.

Upon the habeas corpus proceedings Judge Augustus Hand reviewed the evidence carefully, and held that it clearly established probable cause for the removal of the defendant to the Southern District of Texas.

The assignments of error (R. 59, 60), in so far as they are specific, merely claim that the evidence was not sufficient to show probable cause to hold the defendant on the charge of a conspiracy to violate section 10 of the Criminal Code as properly construed, especially as it was claimed the defendant had never been in the Southern District of Texas during the period referred to in the indictment.

ARGUMENT.

In so far as the absence of the defendant from the Southern District of Texas is concerned, it is clearly settled that a charge of conspiracy is not conditioned upon the presence of any particular conspirator within the jurisdiction. (See *Ex parte Hoffstot*, 180 Fed. 240, 241, 242, affirmed in 218 U. S. 665.)

The other points, and, in fact, the entire case, are determined adversely to the plaintiff in error by the decision of this court in *Henry v. Henkel* (235 U. S. 219, 228, 229), where it is said:

The question has been before this court in many cases—some on original application and others on writ of error; in proceedings which began after arrest and before commitment; after commitment and before conviction; after conviction and before review. The applications were based on the ground of the insufficiency of the charge, the insufficiency of the evidence, or the unconstitutionality of the statute, State or Federal, on which the charge was based. In some of the cases the applicants have advanced the same arguments that are here pressed, including that of the hardship of being taken to a distant State for trial upon an indictment alleged to be void.

But in all these instances, and notwithstanding the variety of forms in which the question has been presented, the court, with the exceptions named, has uniformly held that the hearing on *habeas corpus* is not in the nature of a writ of error nor is it intended as a substitute for the functions of the trial court.

Manifestly, this is true as to disputed questions of fact, and it is equally so as to disputed questions of law, whether they relate to the sufficiency of the indictment or the validity of the statute on which the charge is based. These and all other controverted matters of law and fact are for the determination of the trial court. If the objections are sustained or if the defendant is acquitted he will be discharged. If they are overruled and he is convicted he has the right of review. (*Kaizo v. Henry*, 211 U. S. 146, 148.) The rule is the same whether he is committed for trial in a court within the district or held under a warrant of removal to another State. He can not, in either case, anticipate the regular course of proceeding by alleging a want of jurisdiction and demanding a ruling thereon in *habeas corpus* proceedings. (*Glasgow v. Moyer*, 225 U. S. 420; *In re Gregory*, 219 U. S. 210; *Ex parte Simon*, 208 U. S. 144; *Johnson v. Hoy*, 227 U. S. 245; *Urquhart v. Brown*, 205 U. S. 179; *Hyde v. Shine*, 199 U. S. 62; *Beavers v. Henkel*, 194 U. S. 78; *Riggins v. United States*, 199 U. S. 547, 551; *Ex parte Royall*, 117 U. S. 241.)

See also *Daeche v. Bolleschweiler* (241 U. S. 641); *Rumely v. McCarthy* (250 U. S. 283, 288, 289).

Upon the special point of the absence of evidence, this court said in *Harlan v. McGourin* (218 U. S. 442, 448):

* * * The contention is that in the respects pointed out the testimony wholly fails to support the charge. The attack is thus not

upon the jurisdiction and authority of the court to proceed to investigate and determine the truth of the charge, but upon the sufficiency of the evidence to show the guilt of the accused. This has never been held to be within the province of a writ of *habeas corpus*. Upon *habeas corpus* the court examines only the power and authority of the court to act, not the correctness of its conclusions. * * *

This statement of the law was affirmed in the case of *Matter of Gregory* (219 U. S. 210, 214).

It is argued in the brief on behalf of plaintiff in error, pages 4 to 13, that the testimony before the commissioner did not show a hiring or retaining within the meaning of section 10 Criminal Code, the statute contemplating a distinct contract for a consideration which was not proved. As has been stated, such an argument as to the construction of the statute and the sufficiency of the evidence is not open on *habeas corpus*, being proper only to the District Court for the Southern District of Texas, which has jurisdiction to determine these questions. But even if the argument were permissible, the charge was not that Gayon hired or retained Averitt, but that he conspired to hire or retain persons generally. General Blanquet was in Mexico in arms against Carranza, Gayon was his representative, and as such he gave Averitt letters to persons on the border which were to assure his transit to Blanquet's army and his favorable reception there. Therefore, whether the particular arrange-

ment with Averitt constituted a violation of section 10 Criminal Code or not was immaterial on a charge of conspiracy to violate that statute. (See *Joplin Mercantile Co. v. U. S.*, 286 U. S. 531, 535, 536.)

The writ of error should be dismissed, or the judgment below affirmed.

ROBERT P. STEWART,
Assistant Attorney General.

W. C. HERRON,
Attorney.



Opinion of the Court.

GAYON v. McCARTHY, UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK, ET AL.**APPEAL FROM AND ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.**

No. 540. Argued January 6, 1920.—Decided March 1, 1920.

Engaging another to go to Mexico to join revolutionary forces, under promise of a commission and probable reimbursement for expenses, is a "retaining," within the meaning of § 10 of the Criminal Code.
P. 177.

Evidence held sufficient to show probable cause, and sustain an order of removal.

Affirmed.

THE case is stated in the opinion.

Mr. William S. Bennet with whom *Mr. A. M. Wattenberg* was on the brief, for appellant and plaintiff in error.

Mr. Assistant Attorney General Stewart, with whom *Mr. W. C. Herron* was on the brief, for appellees and defendants in error.

MR. JUSTICE CLARKE delivered the opinion of the court.

The appellant, Gayon, was indicted in the Southern District of Texas for conspiring (§ 37 of the Criminal Code) with one Naranjo, of San Antonio, Texas, and with one Mendoza, of Laredo, Texas, about January 1st, 1919, to hire and retain Foster Averitt, a citizen of the United States, to go to Mexico, there to enlist in military forces organized in the interest of Felix Diaz, then in revolt against the Government of Mexico, with which the United

States was at peace, in violation of § 10 of the Criminal Code, as amended May 7, 1917, (40 Stat. 39, c. 11).

Gayon was arrested in New York, and, after a full hearing before a Commissioner of the United States, was held subject to the order of the District Court for his removal to Texas.

Thereupon, by petition for writs of *habeas corpus* and certiorari, the case was removed to the District Court for the Southern District of New York, and, upon a hearing on a transcript of the evidence before the Commissioner, that court discharged the writ of *habeas corpus* and entered an order that a warrant issue for the removal of the appellant to Texas. An appeal brings this order here for review.

The principles and practice applicable to this case are abundantly settled: *Greene v. Henkel*, 183 U. S. 249, 261; *Bearers v. Haubert*, 198 U. S. 77; *Hyde v. Shine*, 199 U. S. 62, 84; *Tinsley v. Treat*, 205 U. S. 20; *Haas v. Henkel*, 216 U. S. 462, 475; *Price v. Henkel*, 216 U. S. 488, 490; *Hyde v. United States*, 225 U. S. 347; *Brown v. Elliott*, 225 U. S. 392; *Henry v. Henkel*, 235 U. S. 219.

Of many errors assigned only two are argued, viz: That the court erred in holding: (1) That the acts committed by the appellant "of which there was any evidence before the Commissioner" constituted a crime under § 10 of the Penal Code, and (2) that the evidence before the Commissioner showed probable cause for believing the defendant guilty of the crime charged in the indictment.

By these assignments of error the correct rule of decision is recognized, that if there was before the Commissioner or District Court evidence showing probable cause for believing the defendant guilty of having conspired with Naranjo or Mendoza, when either was in the Southern District of Texas, to hire or retain Averitt to go to Mexico to enlist in the insurgent forces operating under General Diaz against the Mexican Government, the order of the District Court must be affirmed.

171.

Opinion of the Court.

The evidence before the Commissioner, carried to the District Court, may be summarized as follows:

The Government introduced the indictment and, with the admission by Gayon that he was the person named therein, rested. This established a *prima facie* case in the absence of other evidence. *Tinsley v. Treat*, 205 U. S. 20, 31, and cases cited.

Thereupon the testimony of the accused and of one Del Villar was introduced by appellant, and that of Averitt by the Government, which we condense into narrative form:

For five years before the arrest, Del Villar, a political exile from Mexico, had maintained offices in New York, from which he had conducted a systematic propaganda in the interest of Felix Diaz and against the Mexican Government.

The accused, Gayon, is a Mexican citizen, and during several administrations prior to that of Carranza had served as consul for the Mexican Government at Roma, Texas, and at other places within and without the United States. For about two years he had been secretary to Del Villar and for some time prior to his arrest was in the joint service and pay of Del Villar and General Aurelio Blanquet, the latter then in Mexico serving with the forces of Diaz.

Naranjo was editor and publisher of a newspaper at San Antonio, Texas, called "Revista Mexicana" (Mexican Review), which was opposed to the established Mexican Government and favorable to the revolutionists operating in the interest of Diaz.

On December 12, 1918, Gayon wrote from New York to Naranjo at San Antonio to secure an advertisement in the Review for "my work 'El General Blanquet,'" saying: "There are some reasons that you may know in the next few days why I want a big circulation of the book," asking if he might send some copies to be sold at the newspaper

office, and concluding, "I will await your letters hoping to give you good news in my next letter."

On December 23, 1918, Gayon wrote Naranjo, addressing him as "My dear Friend," and saying that he had received his letter of the 18th instant. In this letter a discussion of the sale of his book "*El General Blanquet*" is followed by comment on the activities of other persons, in which he discourages new projects and urges joining "with the National Union Committees," which he states had already passed the embryonic state and now constitute a reality. He concludes: "God grant us, now that we are on the threshold of success, we may leave aside our obstinate custom of projecting, and go ahead to produce results exclusively."

On January 14, and again on January 21, 1919, he addressed Naranjo as "My dear Friend" and discussed further advertising and circulating of his book.

This correspondence makes it clear enough that Gayon, although in New York, in December, 1918, and January, 1919, was in close association with Naranjo, and that the two were actively engaged in promoting opposition to the established Mexican Government.

On January 5, 1919, Foster Averitt, an American citizen, whose home was in Texas, called at the office of Gayon, and what passed between them is derived from the testimony of the two, as follows:

Averitt had recently resigned from the United States Naval Academy at Annapolis and, being without employment, says that he called at the office of Gayon, for the purpose of securing, if possible, a position in Mexico or Central America as an engineer. He was wearing his uniform as midshipman of the United States Navy and he first showed Gayon some official papers, which the latter did not read, and then said that he was of the United States Navy, and that he must go at once to Mexico to see Generals Diaz and Blanquet personally. He did not give

any reason for desiring to see these men but asked for letters of introduction to them, which Gayon refused until he could confer with Del Villar. Averitt returned the next day and, after discussing with Gayon conditions in Mexico, the location of the several armed forces near the border, and whether he should go by sea to Vera Cruz or overland, he again left for the day. On returning the next day he received from Gayon two letters, one addressed to Naranjo, at San Antonio, and one to "General Aurelio Blanquet, General Headquarters, Mexico."

Gayon had no knowledge of or acquaintance with Averitt before his first call at his office and he did not present any letters of introduction, but in the letter to Naranjo, Gayon introduced him as "undertaking a trip to Mexico on special mission to Generals Felix Diaz and Aurelio Blanquet," and requested that he "supply him the necessary information to enable him to make his trip as quickly as possible."

The letter which he gave to Averitt addressed to General Blanquet opens with this paragraph:

"The bearer, Mr. Foster Averitt, Marine Guard of the United States, will inform you about the reasons for his trip and of the work we are undertaking here. I kindly request from you, after meeting Mr. Foster [sic], to be good enough to introduce him to General Felix Diaz, as he wants to take up some matters with both of you."

The remainder of the letter explains how he had given publicity to "the recent successful arrival" of the General in Mexico and the motives inspiring the movement of reorganization under the leadership of General Diaz. It predicts early recognition by our Government of the belligerency of the Diaz insurgents and urges the General to write as often as possible to enable "us to continue our campaign of propaganda."

Supplied with these letters, Averitt straightway went to San Antonio and presented his letter to Naranjo who,

after some conferences with him, gave him a letter to General Santiago Mendoza, at Laredo, on the border. This letter was presented to Mendoza and through him arrangements were made for Averitt's crossing into Mexico with two or three others, but they were arrested by customs guards and the proceedings we are considering followed.

In the interviews in New York there was suggestion of payment of expenses and a commission for Averitt, but Gayon, saying that the furnishing of either would violate the neutrality laws of the United States, told him there would be no difficulty in his getting a commission from General Blanquet on his arrival in Mexico and the last thing he said to him when leaving was "that he expected that he should be at least a Colonel when he saw him again down there." He told him it might be possible to have his expenses made up to him when he arrived in Mexico, and, as a matter of fact, he received \$15 from General Mendoza at Laredo.

The statute which Gayon is charged with violating provides that "whoever, within the territory or jurisdiction of the United States . . . hires or retains another . . . to go beyond the limits or jurisdiction of the United States with intent to be enlisted . . . in the service of any foreign . . . people" shall be punished as provided. And the overt acts charged in the indictment are; that Gayon delivered to Averitt at New York a letter addressed to Naranjo, and at the same time gave him instructions with respect to presenting it and impliedly promised Averitt that upon his arrival in Mexico he would be given a commission in the army of General Blanquet; that at the same time he delivered to Averitt a letter addressed to General Blanquet, who was then in Mexico in command of revolutionary forces; that Averitt visited and held conferences with Naranjo who gave him a letter to Mendoza, at Laredo, in the Southern District of

171.

Opinion of the Court.

Texas; and that Averitt, under instructions received from Naranjo, called upon and conferred with Mendoza at Laredo and with him arranged to enter Mexico with others, with intent to join the forces of Diaz under General Blanquet.

While the narration of what took place between Gayon and Averitt does not show a hiring of the latter in the ordinary sense of the word, yet, when taken with the conduct of Averitt in going immediately to Texas, and in attempting to cross into Mexico, plainly, it tends to show that Gayon retained Averitt in the sense of engaging him to go to Mexico, that he was induced to enter into that engagement by the promise that he would be given a commission in the forces of Diaz when he arrived there and that he would probably be reimbursed for his expenses.

There was also evidence tending to show that by communication and concerted action between Gayon, Naranjo and Mendoza, Averitt was induced to go from New York to the border and would have succeeded in reaching Mexico and joining the insurgent forces but for the vigilance of the United States officers who arrested him. The evidence also is that Mendoza conferred with Averitt and acted in promotion of the conspiracy when in the Southern District of Texas, thus establishing the jurisdiction of the court to which the indictment was returned, under *Hyde v. United States*, 225 U. S. 347, and *Brown v. Elliott*, 225 U. S. 392.

The word "retain" is used in the statute as an alternative to "hire" and means something different from the usual employment with payment in money. One may be retained, in the sense of engaged, to render a service as effectively by a verbal as by a written promise, by a prospect for advancement or payment in the future as by the immediate payment of cash. As stated long ago by a noted Attorney General, in an opinion dealing with this statute:

"A party may be retained by verbal promise, or by invitation, for a declared or known purpose. If such a statute could be evaded or set at naught by elaborate contrivances to engage without enlisting, to retain without hiring, to invite without recruiting, . . . it would be idle to pass acts of Congress for the punishment of this or any other offence." 7 Ops. Atty. Gen. 367, 378, 379.

This discussion of the record makes it sufficiently clear that there was substantial evidence before the Commissioner and the court tending to show that § 10 of the Criminal Code had been violated and that there was probable cause for believing the appellant guilty of conspiring with Naranjo and Mendoza to compass that violation, as charged in the indictment, and therefore the order of the District Court must be

Affirmed.
